

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK

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4 THE STATE OF ARIZONA,)
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6 Plaintiff,)
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8 vs.)
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10 STEVEN CARROLL DEMOCKER,)
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13 Defendant.)
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P.300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, FEBRUARY 19, 2010
1:36 P.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS TO PRECLUDE
AND JURY QUESTIONNAIRE

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

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FEBRUARY 19, 2010
1:36 P.M.

HEARING ON MOTIONS AND JURY QUESTIONNAIRE

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAPOURE.

FOR THE DEFENDANT: MR. JOHN SEARS AND MS. ANNE
CHAPMAN.

THE COURT: This is CR 2008-1339, State versus
Steven Carroll DeMocker. Mr. DeMocker is present, in
custody. He's represented by Miss Chapman and Mr. Sears
today. Mr. Papoure and Mr. Butner are here on behalf of the
County Attorney's Office, representing the State.

I think what we had originally scheduled
for today is to go over some of the pending issues inclusive
of the motion to preclude Detectives Page and Kennedy as
experts. That motion, filed January 29, 2010. I have
received a response and reply in connection with that. Still
some issues with regard to the jury and timing of that.

Subsequently, I have received a motion,
filed February 5th, a response and amended response and a
reply concerning the defendant's motion to preclude and
asking for sanctions.

And I have received a motion for release
of medical records, a response to that by the State and a
reply. That was filed on February 5th.

1 I have received, I think, what
2 Mr. Hammond had previously called an omnibus death penalty
3 motion, filed February 16th and asking for an evidentiary
4 hearing and oral argument in connection with that.

5 I have received a February
6 18th -- yesterday, a motion from the State with regard to
7 appointment of psychological experts under the auspices of
8 13-753 and 754. Obviously, the response has not become due
9 in connection with that.

10 And then I think a seventh matter, the
11 State's motion in limine with regard to preclusion of certain
12 evidence with regard to James Knapp, and that was just filed
13 three days ago. So, no responses, yet, on those matters.

14 What order would you like to take up
15 these matters, and what can we do where there is no
16 disagreement, Mr. Sears?

17 MR. SEARS: Well, I was --

18 THE COURT: If there is such a thing.

19 MR. SEARS: I was all set to speak until you
20 threw that last phrasing about no disagreement. I am not
21 sure there is anything we can do, at this point, by
22 agreement, except, perhaps, we could talk for a moment about
23 the two recently filed motions from the State, which we have
24 not yet responded -- the motion for appointment of someone to
25 conduct a psychological pre-screen of Mr. DeMocker and the

1 motion regarding evidence about Mr. Knapp brought under
2 Evidence Rule 608. And maybe after a little discussion, we
3 might be able to have a better understanding or maybe reach
4 some agreements on that.

5 Beyond that, I know that the State has a
6 number of witnesses here today that I think are here in
7 connection with the motions regarding experts in this case.
8 Miss Chapman is going to speak to the lengthy motion
9 regarding late disclosure of experts, witnesses and exhibits
10 in this case. And I have in mind some things I would like to
11 talk about on the jury questionnaire front and on the
12 scheduling and logistics of the jury selection process.

13 So if we could take just a minute, maybe,
14 and go to those two motions, the Rule 608 motion and the
15 competency pre-screen motion. I had a couple of thoughts on
16 those that might drive that discussion.

17 THE COURT: Mr. Butner, what do you have in
18 terms of needs to excuse folks and the like?

19 MR. BUTNER: Well, Judge, we have a bunch of
20 witnesses here waiting to testify on the other motions, and
21 as I understand it --

22 THE COURT: Which other motions?

23 MR. BUTNER: The motion to preclude experts
24 and then the State's motion in limine to have these people
25 qualified, in essence, as experts.

1 THE COURT: All right. Perhaps I ought to
2 take that up as opposed to taking up things that are more
3 legal argument, initially.

4 MR. BUTNER: That is kind of what my thought
5 was, Judge. Plus, the State's motion in limine concerning
6 James Knapp evidence, so to speak. I don't know that -- the
7 defense hasn't responded yet. That isn't ripe yet.

8 THE COURT: It was filed three days ago.

9 MR. BUTNER: Right.

10 THE COURT: I haven't seen a response yet.

11 MR. BUTNER: Right. And so that would be my
12 thought.

13 THE COURT: Can we go ahead with whatever
14 evidence I need to have in terms of the experts and excusing
15 witnesses and the like, Miss Chapman?

16 MS. CHAPMAN: Your Honor, I think with respect
17 to -- there are two kinds of categories of issues with
18 respect to the experts. One is the general question with
19 respect to late disclosure, and one is the question with
20 respect to qualification of some particular experts.

21 I think Mr. Sears is going to handle the
22 question with respect to Detectives Kennedy and Page. And I
23 don't know if you want to take up separately the question of
24 the late disclosure in the initial matter before you,
25 consider whether or not they're properly qualified. It seems

1 like that would be a proper first step.

2 THE COURT: Probably so. So why don't I have
3 you address the issue with regard to what additional experts
4 you've listed, Mr. Butner, whether they should be or could be
5 precluded based on the -- I guess what I have seen is a
6 motion to preclude because of untimeliness of disclosure of
7 the newly listed experts. I have seen some withdrawals of
8 some of the folks that may be listed as experts before.
9 There is a preclusion issue with regard to that, somewhat
10 maybe. That is not as much in dispute. But you recently,
11 apparently, listed, like, tracking experts and such. Tell me
12 why that isn't covered by the orders previously entered.

13 MR. BUTNER: Well, Judge, basically, the State
14 was not of the understanding that a witness needed to be
15 qualified as an expert to do tracking. That is something
16 that is generally within officers' fields of experience, and
17 we have some that are experienced trackers. But then the
18 Court alluded to the fact that maybe these people needed to
19 be qualified as experts. At least that was my understanding.

20 And so I identified certain people --
21 that would be Teresa Kennedy and Scott Mascher -- as experts
22 in terms of tracking, because they had a breadth of
23 experience and education in those specific areas, and they
24 did tracking in connection with this case. And tracking is
25 to be distinguished from shoeprint identification. Okay?

1 There has been some overlap about that. There really isn't
2 an overlap in that area. It's a matter of being able to
3 follow the same footprint, one after another, in some sort of
4 an area, and track those footprints.

5 Well, Teresa Kennedy is qualified to do
6 that and so is Scott Mascher. If they need to be qualified
7 as an expert in order to testify in this case about the
8 tracking that they did in this case, then I felt as if I
9 needed to identify them as an expert and have them qualified.

10 THE COURT: Now, both their names, at least as
11 far as individuals who were connected with the investigation
12 who did some kind of tracking, that came out early?

13 MR. BUTNER: Very early. It was some of the
14 first disclosed documents in this case. I don't think there
15 is any argument whatsoever on that.

16 THE COURT: And so you have them here to
17 testify for some kind of pre-qualification. That is part of
18 what you want.

19 MR. BUTNER: Exactly. And they are both
20 available to testify at this time.

21 THE COURT: Who else were you intending to
22 call on any of the matters?

23 MR. BUTNER: Well, the defense wanted Steve
24 Page excluded as an expert. Steve Page is -- how should I
25 describe this? -- not a fully qualified computer forensic

1 expert, and yet he has a significant amount of training and
2 experience in that field and has been working in this case in
3 an investigative capacity in the D.P.S. forensics computer
4 lab under the supervision, mentoring, peer review of some of
5 the people that are permanently assigned to the lab.

6 THE COURT: Okay. I heard somewhat from
7 Detective Page earlier.

8 Who else do you have that you think I
9 need to have?

10 MR. BUTNER: Then I brought all of the people
11 that were named as experts from the D.P.S. forensics computer
12 lab. Randy Arthur, the head of the lab; Patrick Smith and
13 Roger Hoover and Paul Lindvay. And I felt it would be
14 necessary in order to present some testimony concerning their
15 qualifications. They have been overseeing Mr. Page's
16 efforts. They have also been engaging in some independent
17 things themselves.

18 THE COURT: Okay. Now that you have
19 identified who they are and what you want to talk about, let
20 me turn back to Ms. Chapman and Mr. Sears about the
21 particular individuals and what motions you have with regard
22 to the disclosure issues.

23 Mr. Sears.

24 MR. SEARS: Judge, if we could just focus on
25 Detective Page and Detective Kennedy for a moment. I think

1 one of the problems that we have had in trying to evaluate
2 their role in this case is the shifting concept of whether
3 they are going to testify as lay witnesses or as experts. I
4 hear Mr. Butner say today that his disclosure of them now as
5 experts was somehow in response to something the Court said,
6 that perhaps they need to be qualified as experts. That has
7 put us into this loop where we have serious questions about
8 their qualifications as an expert.

9 What we really lack an understanding of,
10 at this point, is the scope of their proposed expert
11 testimony. In their papers filed in connection with this
12 motion, the State has said, as I understand it, that
13 Detective Page's testimony would be limited to the
14 methodology and procedures used to extract data from
15 computers. And I take that from their own response in this
16 case. If that is so, we suggest that that's cumulative.

17 If the State thinks and the Court agrees
18 that it is necessary for the jury to understand the mechanics
19 of how the computers were analyzed, then I expect that
20 Detective Page, based upon his prior testimony and on
21 materials newly furnished to us, is probably competent to
22 express those opinions. But what I am concerned about is the
23 idea that Detective Page would testify beyond the scope that
24 I've just described and offer opinions about other matters,
25 for which I don't think he is qualified.

1 So I would invite the State to address
2 the scope of the anticipated testimony at trial in the
3 State's case of Detective Page. Similarly --

4 THE COURT: Versus the D.P.S. computer experts
5 who also may have been listed.

6 MR. SEARS: And there are a whole set of
7 different issues with regard to timeliness, with the lack
8 thereof of their disclosure, what work they have done, what
9 the scope of their testimony would be.

10 And by the same token, Detective Kennedy
11 has been interviewed at length in this case by us and has
12 told us, candidly, that she doesn't consider herself an
13 expert. It is not clear still, to me at least, whether she
14 was not an expert in shoeprint comparisons.

15 What I hear Mr. Butner saying today,
16 again, is that what she would testify to is that she located
17 some shoeprints in the dirt near the crime scene and followed
18 them and assisted in the photographing and attempts to map
19 the location of those shoeprints. To a certain degree, I
20 suspect that probably involves looking at something and
21 saying that shoeprint looks a lot like that one and the next
22 one and the one after that and the one after that.

23 If that is the scope of her testimony,
24 and again, I invite Mr. Butner to comment on that -- but if
25 that is the scope of her testimony, I don't think it is

1 expert testimony. I think that is something, as the State
2 points out, that any individual could do. Somebody could
3 look at something and say that sure looks a heck of a lot
4 like that. And I followed those. I don't think you have to
5 be a trained tracker to follow footprints in the dirt in this
6 case. And so I don't necessarily contend that that kind of
7 tracking is expert testimony.

8 If Detective Kennedy is expected to go
9 beyond that, though, and testify about stride length or the
10 age or the relative differences between the shoeprints, then
11 I think that is the subject matter for expert testimony, and
12 that I think, by her own admission and the State's materials
13 provided, she is not such an expert.

14 So I think, as far as Detective Kennedy
15 is concerned, I don't know that we need to hear from her, so
16 long as the State can assure the Court that the scope of her
17 testimony is going to be limited to finding footprints in the
18 dirt and following them and helping to photograph and map
19 them.

20 So that is where we are on Detectives
21 Page and Kennedy, Your Honor.

22 THE COURT: It would probably be helpful to me
23 to know what the intended scope of the testimony would be and
24 an offer of proof.

25 MR. BUTNER: Well, Judge, basically, what

1 Detective Kennedy will testify about is -- first of all, she
2 is a trained tracker, so to speak. She has had some
3 specialized training in that. She located shoeprints at the
4 scene. She located two sets.

5 THE COURT: Two types, yes.

6 MR. BUTNER: Exactly. Two types. And one of
7 the types that she located, she saw the shoe sole of the
8 victim, after she was deceased, and saw that to her untrained
9 eye as a shoe sole expert -- okay? -- those matched the
10 shoeprints that she tracked out in the dirt out behind the
11 Bridle Path residence. It was a very distinctive shoe sole.
12 It had three Zs on it. I mean, it was like, geez, how many
13 of those do you see? And there they go out and come back
14 into this residence.

15 And then she will also testify that there
16 was also another set of prints there that were from the same
17 shoe -- okay? -- that were in an arc in that area and then
18 also went along the fenceline. But in terms of saying what
19 that shoe was or anything like that, she is not expert on
20 that. She just would be able to testify that to her eye
21 those shoeprints went one right after the other and were made
22 by the same kinds of shoes.

23 THE COURT: So it is observational what the
24 track or shoeprint kind of looked like, generally, and where
25 they led her --

1 MR. BUTNER: Right. And she took some rather
2 good photographs, actually, of those shoeprints, unlike maybe
3 some of the others that we've had in this case.

4 So that is basically what she will
5 testify about.

6 THE COURT: Are you intending to have her,
7 other than through photography that -- obviously, if there is
8 a measurement in the photography -- are you intending to have
9 her do anything other than descriptive of her observations?

10 MR. BUTNER: No. She will -- I guess when I
11 say "no," she is going to testify to her view, I guess it
12 would be her opinion/perception, that there were two sets of
13 shoeprints there. She saw the shoeprints from the
14 decedent --

15 THE COURT: What they looked like, that she
16 took photographs, here are the photographs.

17 MR. BUTNER: Right.

18 THE COURT: But she is not going to testify to
19 an identity of the shoe versus some shoe that has been
20 discovered.

21 MR. BUTNER: No. She is not.

22 She will say that those shoeprints that
23 she followed going out from the residence, which were the
24 first ones that she tracked, looked to be made by the shoes
25 worn by the decedent. She will testify that they intersected

1 at a certain point out there in the range land.

2 The other set of shoeprints that she
3 ended up tracking also, and those looked to be made by the
4 same kinds of shoes, but she has no opinions in regard to
5 what types of shoes those are or where they came from or
6 anything along those lines. Just two sets.

7 And then, of course, she did take
8 pictures of the bicycle tracks, and she will testify that
9 they appeared to be similar, that she noted no differences
10 between the tires on the defendant's bicycle and the tracks
11 that were made in the dirt out there.

12 THE COURT: Given that offer of proof,
13 Mr. Sears, do you have need of or do you think I have need of
14 hearing from Detective Kennedy?

15 MR. SEARS: Well, only in this area, Your
16 Honor. I think the case law is, as you are framing your
17 questions of Mr. Butner, that purely observational
18 testimony -- "I saw this. I photographed it. Here is where
19 it was," is not expert testimony and would be part of the
20 permissible testimony of a police officer testifying from
21 their own observations.

22 What concerns us is the idea that she
23 would be able to make any assessment that the shoes that the
24 victim was wearing on the night she was killed are the shoes
25 that made the shoeprints. And the same problem exists with

1 regard to her observations about the bicycle tracks. You
2 might remember last month, when we were talking about
3 Detective Sergeant Winslow's testimony, about something being
4 similar and the problems that that caused.

5 It is a little more complicated, because
6 Detective Kennedy told us at interview that she was not
7 allowed into the room to closely examine -- or didn't go into
8 the room to closely examine the shoes that Miss Kennedy had
9 on, looked at them through the window and had some general
10 observations. I think that is expert testimony. And I think
11 that other people that the State might have available, should
12 they be deemed to have been timely disclosed, might be able
13 to speak to that, but I think that that testimony crosses the
14 line between purely observational testimony, which would be
15 permissible, and Rule 702 expert testimony, saying that those
16 shoes looked like they made those prints.

17 By the same token, her testimony -- or
18 anticipated testimony that the bicycle tracks that she saw in
19 the dirt appear similar to tracks made by tires on
20 Mr. DeMocker's bicycle, which was brought out to the scene,
21 run afoul of the same problem. Those are areas for which
22 there is a requirement of specialized training. And, in
23 fact, the State has now just recently disclosed their own
24 shoeprint expert with a lengthy resume, describing his
25 experience and training and expertise in that area. So I

1 think it would be different for the State to say today that
2 there is no such thing as shoeprint comparison expert
3 testimony. I think the State would have to agree that there
4 is.

5 So if the Court needs to hear from
6 Detective Kennedy about whether or not she thinks that she is
7 an expert on shoeprint comparison -- which, by the way, she
8 told us she was not -- then we do need to hear from her. If
9 the State is willing to concede that she is not such an
10 expert and that they would not offer that testimony, then I
11 think that she could probably be excused for the afternoon.

12 THE COURT: Mr. Butner.

13 MR. BUTNER: Well, those are two different
14 questions. The State is certainly willing to concede that
15 she is not an expert on shoe soles and shoe-sole comparison.
16 But she is a trained observer, and she is in a position to
17 make the kind of observation that any trained observer,
18 layperson, and tracker could make, and that is that the shoes
19 that were on the body of the decedent, with the three Zs on
20 the sole, look to be the shoes that probably made those
21 prints going out from the decedent's house, because they had
22 three Zs in the prints in the dirt.

23 That's the level of her, quote,
24 "opinion," Judge. It's basically the same thing as a lay
25 person looking at the tire tracks of the bicycle and saying

1 "Those look similar to me. I don't see any differences
2 there. I am not an expert. I can't say with absolute
3 certainty that those are the same, but I don't see any
4 differences." It's even more obvious with the decedent's
5 shoes.

6 THE COURT: Do you want to put her on to
7 establish some basis for doing that? It sounds to me like
8 the two of you are in basic agreement as far as what she
9 would testify to, that she is not a shoeprint comparison
10 expert, but that she has some training, in particular with
11 regard to tracking and observation.

12 If you are going to seek to qualify her
13 for the shoeprints, then, I think I will let you put her on
14 and let's get on with it.

15 MR. BUTNER: I never said I wanted to qualify
16 her as an expert on shoeprints, Judge, but that is the rub
17 right there. Is she going to be able to say "Those shoes
18 with the three Zs on the soles that were worn by the
19 decedent, they look like the shoes that made the prints out
20 there in the desert"?

21 I think she should be allowed to offer
22 that kind of an observation. I don't think that is a matter
23 of expert opinion in the least. That is a matter of common
24 observation.

25 THE COURT: If she is allowed to do that,

1 Mr. Sears just said he was, leaving aside the timeliness of
2 it, disclosed some shoe mark or shoeprint by identification
3 witness.

4 MR. BUTNER: We did just disclose a shoeprint
5 identification witness. That witness was disclosed in
6 connection with a pair of shoes that were purchased by the
7 defendant in 2006 that have a sole print that matches the
8 other prints out in the open rangeland behind the homicide
9 scene. And that expert is with the FBI lab in Quantico,
10 Virginia, and will offer that opinion. We just found out
11 about that on January 28th of the year 2010, and we disclosed
12 it right after that.

13 THE COURT: So you don't have a -- per se, a
14 shoeprint expert talking about Miss Kennedy's shoes?

15 MR. BUTNER: No. We do not.

16 THE COURT: Well, this is not unlike what I
17 have already talked about and ruled on in connection with
18 Deputy Winslow.

19 MR. SEARS: It is very similar, from the
20 State's point of view, Judge. No pun intended.

21 THE COURT: The identity -- that's the
22 language thing, again.

23 I think that lay witnesses can testify
24 about their observations. Trained witnesses in tracking can
25 testify about their observations. Police officers can

1 testify about their observations. But it is different than
2 testifying to an identity between a mark and the object
3 creating the mark, unless they are qualified as an expert.

4 So if you think that you need to qualify
5 her as an expert in that kind of marking and that she
6 qualifies as an expert, I will let you make your record. If
7 you think that it's more a matter of as a trained officer and
8 what her observations were, I don't think you need to make
9 that. I think the case law and the rules talk about people
10 being able to testify about what their observations are.

11 But I think the language is important in
12 testifying to an identity or sameness between "X" and "Y," if
13 you are discussing a shoe -- a particular shoe and a
14 particular mark or print that is left from the shoe -- just
15 like fingerprints -- fingers and fingerprints. If you are
16 testifying that there is an identity between the two, as
17 distinguished from here's what the print looks like, describe
18 it. Here's what the shoe looked like, describe it. Did they
19 look similar? Looked similar? Was there an identity? I
20 think that is where the line is.

21 MR. BUTNER: I agree, Judge. And we are not
22 going to offer the, quote, "was there an identity" type of
23 evidence.

24 We are going to say, well, did they look
25 similar? Did they have three Zs on the sole? That kind of

1 observation. Did you see any differences between them? No.
2 Okay.

3 And similarly, Commander Mascher, who is
4 something of a tracking expert himself, he will be offering
5 the same kind of testimony, because he was involved in that
6 same tracking process.

7 THE COURT: In the same area?

8 MR. BUTNER: In the same area.

9 THE COURT: With the same tracks?

10 MR. BUTNER: With the same tracks, Judge.

11 So his testimony is basically going to be
12 along the same line as Detective Kennedy. He did some
13 different tracking than she did but, in essence, the same
14 kind of thing.

15 THE COURT: I would not preclude that kind of
16 observational testimony, just like I would not preclude the
17 observational testimony by Mr. Winslow.

18 Mr. Sears.

19 MR. SEARS: Your Honor, again, I was with
20 Mr. Butner until he kept speaking at the end and said that he
21 wanted to ask -- what he called observational questions,
22 asking about shoeprint similarities. Does this sole
23 impression look like that sole impression? Do you see any
24 differences? That's identity testimony. It's identity
25 testimony lacking, perhaps, the three-run homer at the end,

1 where the witness is asked whether it's a match or whether
2 they're identical or something similar.

3 But to allow a lay witness to go beyond
4 simply saying these are shoeprints, that this track is
5 different than that track, period. This track goes this way,
6 that track goes that way, period -- which is what I see from
7 Detective Kennedy's resume she is trained to do, looking for
8 a trail, avoiding ambushes and similar things. That's where
9 the State, I think, is going to take this witness right up to
10 the line and then over the line, by having them testify about
11 everything and then sitting down before they ask the ultimate
12 question, leaving the jury to stare at photographs, having
13 heard a lay witness with no particular training say those
14 shoeprints have all of the characteristics of those
15 shoeprints.

16 And I think that is beyond what a lay
17 witness can testify to. It's the difference between Rule 702
18 and Rule 703 -- Rule 702 being the general rule, and Rule 703
19 talking about the bases of that opinion.

20 What is lacking here is the Rule 703
21 basis for those opinions, because it is an opinion whether
22 the components of a shoeprint are the same, and it is an
23 opinion whether or not there is any difference between shoe
24 impression "A" and shoeprint impression "B." That is the
25 subject of expert testimony.

1 You can simply say there are shoeprints,
2 here they go, and here is where they went, here's where they
3 stopped. That is lay testimony.

4 Thank you.

5 THE COURT: Well, I think I described where I
6 believe the line is, and that is with the making of a match
7 or an identity, as distinguished from things like lay
8 observations or sometimes categorized as opinions, such as
9 the speed of a vehicle and things like that, but obviously,
10 we have had descriptions authorized with things like that.

11 If you keep your witnesses by pertinent
12 questions framed with an idea of staying away from the
13 identity making, Mr. Butner, I think you are allowed to bring
14 in that testimony, and I don't think that you need to have a
15 hearing with regard to expert qualifications.

16 MR. BUTNER: Judge, I'm belaboring this point,
17 somewhat, out of an abundance of caution. And the caution is
18 because this, obviously, can be mistrial material. I don't
19 want to go there.

20 But I want to make it clear for the
21 Court, neither of these witnesses -- Kennedy or Mascher, and
22 for that matter, Winslow. I mean, they are in the same
23 category.

24 THE COURT: They are.

25 MR. BUTNER: None of these witnesses are going

1 to say something along the lines, as mentioned by Mr. Sears,
2 that all of the characteristics are the same. They aren't
3 going to say that.

4 What they are going to say is -- for
5 example, Winslow: "I rolled the tire in the dirt next to the
6 other tire. They look very similar to me. I couldn't tell
7 the difference. I saw no differences."

8 Similarly with Kennedy. She saw those
9 shoes after the fact, after she did the tracking. She saw
10 pictures of those shoes that were worn by the decedent. She
11 looked at those shoes and she said "Those look like the same
12 marks out in the dirt that I was tracking." I mean, is that
13 identity? No, I don't think that is identity and she's not
14 going to say they're a match.

15 THE COURT: I would say to be more clear in
16 what I am ruling, I would stay away from things that say
17 "same," "match," or "identity."

18 MR. BUTNER: Right.

19 THE COURT: And if she says something is
20 similar, one to the other, and here's why, because they had
21 the Z pattern on the prints, the Z pattern on the shoe, I
22 think that is observational, and I think that that's
23 permissible, and I don't think you need to qualify her as an
24 expert to testify to that.

25 MR. BUTNER: Exactly what I propose to do,

1 Judge.

2 And in regard to those other prints out
3 there -- you know, there's the tire prints, there's the
4 decedent's prints, and then there is those other prints that
5 we do have an expert for, that we've just now discovered, so
6 to speak -- that witness is an expert. We will be presenting
7 him for qualification to the Court as such, and he would be
8 offering an opinion concerning identity, based upon his
9 training and education and expertise in that field.

10 THE COURT: Who is that?

11 MR. BUTNER: His name is Eric Gilkerson. He
12 was identified in the January 29th disclosure by the State.

13 THE COURT: Thank you. Did you want to
14 address Detective Page and what your offer is, or how you are
15 going to approach that?

16 MR. BUTNER: Yeah. Detective Page is a
17 trained investigator in computer forensics, and he discovered
18 certain items of evidence in this case. The Court is aware
19 of, in essence, the research about how to kill somebody, make
20 it look like a suicide/accident, is how it has been referred
21 to frequently in the case.

22 Detective Page has had mentoring and
23 assistance from people in the D.P.S. forensics computer lab.
24 He is not an expert on computers or forensic analysis of
25 computers, but he will be offering evidence to the Court, to

1 the jury about what the defendant was looking at on his
2 computer when he did that research. And that is the nature
3 of Detective Page's investigation.

4 There is other things, too, that he has
5 worked on, such as e-mails, and there are some encrypted
6 Quicken Books that he will be involved in testifying about,
7 too, if he ever gets them unencrypted. But the focus
8 primarily for today's hearing would be Detective Page
9 testifying about what exactly the defendant was looking at.
10 Now, I don't think he necessarily needs to be an expert on
11 computers to offer that testimony. He has been able to go
12 back and go through the EnCase program and find these things
13 and reconstruct through that program what the defendant
14 looked at when he did that research.

15 And so that would be the nature of his
16 testimony in this case. I think that is what, basically, we
17 are arguing about today.

18 THE COURT: Mr. Sears.

19 MR. SEARS: Again, I am concerned that this
20 offer from the State, now, of what Detective Page would
21 testify to, goes beyond what they have said in writing he
22 would testify to, which is, as I understood your papers in
23 connection with this motion, testimony limited simply to the
24 mechanics of extracting data from computers.

25 What I am hearing now is that Detective

1 Page may try to testify about some of the things he testified
2 to in some of the earlier evidentiary hearings, where these
3 rules would not have been strictly applied. By the materials
4 they have given us and by what Mr. Butner has said again here
5 in court today, I don't think Detective Page qualifies as an
6 expert on the particular matters regarding data that was
7 extracted beyond the simple methodology about how you go
8 about extracting it. There are technical questions that I
9 think are beyond his expertise and training and experience
10 about when those searches were done, how they were done,
11 where they were recovered and --

12 THE COURT: When the original searches were
13 done by whoever did them.

14 MR. SEARS: That's right. That's right.

15 And that is why we thought that Detective
16 Page's testimony was likely cumulative of the anticipated
17 testimony of some of these other or newly disclosed D.P.S.
18 experts about whom we know a lot less in terms of what work
19 they've done and what opinions they would propose to give in
20 this trial. I think that is the subject of the remainder of
21 this evidentiary hearing.

22 But my concern with Detective Page is
23 that if we all agree, which I think we do, that he is an
24 investigator that has some limited computer expertise, then I
25 think what the State has just told you they want him to

1 testify to goes beyond his stated skill and expertise and
2 would overlap and be cumulative of testimony from other
3 people. He is simply the person that used these software
4 tools, these investigative tools to extract information,
5 using some pretty basic search techniques in this case.

6 But what I am hearing from the State,
7 now, is they expect him to be able to stand up in front of a
8 jury and say far more than that about what it means and what
9 it means about what the defendant was doing and how he was
10 using his computer and things like that, which I think are
11 not within his expertise. And I have not heard the State or
12 seen the State define or redefine either what the scope of
13 this testimony would be or how his particular training and
14 expertise would qualify him under 702 and 703 to offer those
15 advanced opinions.

16 THE COURT: Mr. Butner, do you think you need
17 to add to what was testified to already by Detective Page at
18 the prior hearing in terms of his background?

19 MR. BUTNER: I can't remember exactly, Judge.
20 His curriculum vitae is marked. If we could just put it into
21 evidence, I think that would cover everything that he is
22 going to testify about today, in terms of his qualifications
23 to testify about the areas that we seek to offer his
24 testimony.

25 But I want to clarify that the State is

1 not seeking to offer Detective Page as a witness to testify
2 about what it means when the defendant was researching in the
3 area of how to kill somebody and make it look like a
4 suicide/accident. We are not offering him for that kind of
5 testimony.

6 We are offering him for the testimony
7 that here is what he found inside the defendant's computer,
8 what the defendant was looking at when he was doing that
9 research.

10 THE COURT: Essentially, what Mr. Sears was
11 talking about, the extraction process, using EnCase to pull
12 it out, to see what was looked at, as far as that software
13 program is applicable.

14 MR. BUTNER: That's correct. And then the
15 screens that were looked at by the defendant when he did that
16 research.

17 THE COURT: Based on the derived information.

18 MR. BUTNER: Exactly. Based on the derived
19 information from the computer research programs.

20 THE COURT: I don't think that that requires
21 any additional curriculum vitae or expertise, so long as
22 that's all he is being used to testify about. I think
23 that's, again, an investigative matter that he can talk about
24 what he observed, how he made the course of his
25 investigation, what materials he used or software mechanisms

1 he used to do research. That does not strike me that you are
2 offering him as an expert in that sense.

3 He has additional expertise beyond what
4 the jury may have in connection with using that particular
5 item of software in looking for particular types of
6 information, and he can testify what he found --

7 MR. BUTNER: Exactly.

8 THE COURT: -- with regard to that. I don't
9 see that as needing additional expertise. But I also think
10 that if he testifies as to those things, he is also going to
11 be limited by his acknowledged deficiencies, which he's
12 already to some extent testified about, during the previous
13 hearings, and he can be cross-examined on that.

14 So I don't see -- as long as you are
15 limiting your proffer of those witnesses to those fields, I
16 don't see that I need to conduct a separate hearing with
17 regard to expertise. I don't think that that is an area that
18 is covered by 703 requiring particularized qualifications of
19 the witness. But my cautionary note on that would be don't
20 go beyond the area of his expertise.

21 MR. BUTNER: Right.

22 THE COURT: Mr. Sears.

23 MR. SEARS: Judge, I'm looking, again, at the
24 State's response, particularly at Page 2 to this motion,
25 talking about Detective Page. And it says at Line 6,

1 beginning on 6: "Detective Page's expertise lies in the
2 operation of software" and then the full name of the EnCase
3 program and then two other programs. And it describes what
4 they are.

5 It says, "Detective Page has experience
6 in using this specialized software to collect all relevant
7 evidence while not altering anything of the original. His
8 testimony will assist the jury in understanding how the
9 information was extracted for later analysis."

10 Then Line 21 says, "The expert testimony
11 of Detective Page is not cumulative forensic expert
12 testimony; rather, Detective Page is the expert who can
13 testify about the software that was used to extract forensic
14 evidence from the evidence. Much of what Detective Page will
15 testify to at trial, the defendant has known about since the
16 hearings."

17 That's the sentence that gave us some
18 pause in this case. We were with the State right to that
19 point, saying he is the software person that can talk about
20 what these various programs are and how they were applied to
21 this case and how they were done to protect the integrity of
22 the data.

23 I have not heard Mr. Butner say here
24 today, nor did they expand in their written submissions to
25 the Court, about what else Detective Page would testify to,

1 except the sort of disconcerting idea that maybe Detective
2 Page would start talking about screen shots and screen caps
3 and other things that were produced, which I think are beyond
4 the scope of what they described at Page 2 of their response,
5 which he is just going talk about how to use the software to
6 get the data. That, I think he is qualified to do.

7 I think he is not qualified to testify
8 about much else beyond that. And if the State is not
9 prepared to make a detailed proffer here today of what he
10 would testify to, I suppose an admonition to the Court
11 similar to the one just given about the impression evidence
12 might be appropriate here, because this is a line that we
13 think the State will push Detective Page uncomfortably close
14 to, if not cautioned by the Court.

15 THE COURT: Mr. Butner.

16 MR. BUTNER: Well, Judge, I guess that is what
17 these motion arguments are about -- clarification.

18 Detective Page is going to testify about
19 what the screens were that were looked at by the defendant,
20 not any impressions, but rather just what those screens were.
21 He will be able, with the use of this EnCase program, to
22 reconstruct that -- those images, and that's what his
23 testimony will be about. It won't be in terms of --

24 THE COURT: Analysis of the screens or --

25 MR. BUTNER: Yeah. Or what the defendant was

1 thinking or what impressions should be formed or any of that.

2 THE COURT: I think that that is where his
3 testimony is limited. I think it's the extraction process,
4 what applications he used to make the extractions, what he
5 was able to view or document was looked at based on the use
6 of those programs. But interpretive analysis of it, I think
7 is beyond the scope of his qualifications.

8 MR. SEARS: I agree, Your Honor, and I
9 appreciate the Court's guidance on this.

10 I think we made some real progress here
11 in using this process, and maybe rather than simply put on
12 witness after witness, maybe we can engage in some of the
13 same process here with the remaining D.P.S. witnesses,
14 particularly the ones about whom we know very little in terms
15 of what they are likely to say in this case. I think that
16 would help focus what needs to be done in terms of evidence
17 or testimony today and what arguments are. But I think it
18 might be productive to have the State make the same kind of
19 offer with regard to these additional witnesses.

20 THE COURT: Are you willing to do that,
21 Mr. Butner?

22 MR. BUTNER: Not really, Judge. I don't have
23 all of that stuff committed to memory about each of these
24 witnesses.

25 THE COURT: By comparison to Page and Kennedy?

1 MR. BUTNER: Right. Page and Kennedy and
2 Mascher are relatively simple and straightforward, and I can
3 handle those.

4 The other people that are up here from
5 the D.P.S. forensic computer lab, it's a different sort of
6 situation, and they have different areas of examination, so
7 to speak, in this case.

8 THE COURT: My understanding is there was some
9 issue raised by the defense with regard to late disclosure
10 on -- maybe it's them, maybe it's not them. I guess I am not
11 especially clear on to whom their motion is addressed,
12 whether it applies to the forensic witnesses that you are
13 talking about, now, although it would seem to.

14 So tell me, basically, what your
15 understanding is of the additional D.P.S. forensic computer
16 witnesses, what the need is for them, what they are going to
17 talk about if they testify.

18 MR. BUTNER: Well, Judge, for example,
19 certainly Roger Hoover was early disclosed in this case, and
20 I know that at least part of his area of analysis in this
21 case were cell phones. And he engaged in that and has
22 provided a report or reports -- I can't remember, now --
23 concerning that analysis.

24 THE COURT: The deceased Mrs. Kennedy's and
25 Mr. DeMocker's cell phones?

1 MR. BUTNER: I believe so. Those are the two
2 primary cell phones of emphasis. I am not sure if he's
3 analyzed other ones or not.

4 THE COURT: All right. Anyone else that has
5 been more recently disclosed that you think there may be some
6 issues with?

7 MR. BUTNER: And also he analyzed Katie's cell
8 phone, too, Judge.

9 THE COURT: Thank you. By the way, before we
10 leave the topic of Katie, I did go ahead and sign the release
11 order with regard to her property that was stipulated to
12 between --

13 MR. BUTNER: Thanks, Judge. I am sure she
14 will be glad to get that stuff.

15 Paul Lindvay was brought into the case,
16 basically, to mentor and peer review the work that was done
17 by Steve Page. He will not necessarily testify as an expert
18 in this case, in light of the fact that I think we've
19 established the parameters under which Steve Page is going to
20 testify. But Mr. Lindvay made sure that Steve was following
21 the appropriate -- I think the standard protocols are from an
22 outfit called IACIS -- that's an acronym, and I can't even
23 remember all of the letters -- but it's I-A, and there's an
24 "S" and another "A" in there. There might be a couple of
25 A's.

1 In any event, this is the international
2 computer analysis association that has standards and
3 protocols and training that is required of people that do
4 this kind of work, and Mr. Lindvay is a highly qualified
5 expert in that area who oversaw the work that was done by
6 Detective Page and in some instances, signed off on the peer
7 review on Detective Page's reports.

8 Randy Arthur is the head of the D.P.S.
9 forensic computer lab down there, and he also oversaw some of
10 the work done by Detective Page and supervised that work
11 being done.

12 And Patrick Smith is in the lab down
13 there.

14 One of the issues that came up in this
15 case is -- and it was discussed a lot more earlier on than as
16 of late -- is what caused Mr. DeMocker's laptop computer to
17 come on and go off while it was in the possession of the
18 Yavapai County Sheriff's Office. Well, I think the Court
19 remembers that coming up at certain points in time in the
20 case.

21 Mr. Lindvay and Mr. Smith both documented
22 and investigated how that occurred, and it took quite a
23 period of time to analyze it, and they also, in essence,
24 videotaped the whole operation, which lasted a number of days
25 of how that computer -- when the batteries are charged, it

1 does fine, even though you shut it off, then it -- somehow
2 when the batteries are going dead, it activates itself, stays
3 on for a period of time, certain things occur -- and I am
4 butchering, this, mind you, Judge, from this lay person's
5 explanation -- but certain things occur, and then it shuts
6 itself back off and it's dead, period.

7 They investigated that and documented all
8 of that. Well, that took a long period of time, and they
9 have now recorded all of that. And they will be in a
10 position to testify about what took place in that regard.

11 So I think, basically, that that's what
12 these gentlemen are going to be testifying about. And
13 Mr. Smith is the person that videoed all of that, and there
14 has also been a report that has been provided concerning that
15 investigation.

16 THE COURT: I don't know how helpful that is
17 to the defense's understanding of the proffer of those
18 witnesses, whether you think I need to have them qualified as
19 experts or not in this kind of hearing, as distinguished from
20 having them testify in some fashion to let me know why they
21 are late disclosed or something like that.

22 MS. CHAPMAN: Well, Your Honor, the issue with
23 the late disclosure, with respect to the D.P.S. experts, is
24 twofold. First, with respect to the individual expert,
25 Mr. Castle -- and my understanding, from the latest response,

1 although subject to change, I guess, here today, that the
2 State doesn't intend to call Mr. Castle.

3 If that is the case, then if they are not
4 going to call him, I don't think we need to talk about it.
5 But if they are still considering that they may call him,
6 then I think we do. So I will let them respond to that with
7 respect to Mr. Castle.

8 THE COURT: Is Mr. Castle going to be called,
9 Mr. Butner?

10 MR. BUTNER: Let me explain, Judge.
11 Mr. Castle was listed as a witness for one specific item of
12 evidence, and that is the defendant's BlackBerry. We had
13 been trying for a long time to get the defendant's BlackBerry
14 to open, so to speak. We had been provided a couple of
15 passwords from the defense. Those didn't work. We didn't
16 want to go any further with that or the BlackBerry apparently
17 would lock up and never be openable, so to peak.

18 We subpoenaed records from UBS. It took
19 a long, long, long time to get those records from UBS. Their
20 records were maintained on one central server. This central
21 server handled the defendant's BlackBerry as well as the
22 defendant's UBS business computer. And everything went
23 through there. They could not provide us any information
24 from that until they went through all of it -- some 14,000
25 e-mails. We just recently got that.

1 Mr. Castle was listed as a witness, in
2 the event we had to crack the BlackBerry, so to speak. He
3 had some expertise in that regard. We have now finally
4 gotten these 14 thousand e-mails from UBS. We do not have to
5 crack the BlackBerry. Mr. Castle will not be used as a
6 witness.

7 THE COURT: Thank you. Is that helpful?

8 MS. CHAPMAN: That is helpful with respect to
9 Mr. Castle.

10 With respect to the other D.P.S. experts
11 that Mr. Butner has just discussed, our problem is that the
12 D.P.S. reports were just disclosed to us on February 1st. We
13 received three CDs of D.P.S. reports for all the CDs, DVDs,
14 iPods, thumb drives, hard drives that we received.

15 The State's response is, well,
16 Mr. DeMocker had access to that prior to the time of his
17 arrest, because they were in his possession. With respect to
18 some of those, that is true, although, obviously, he did not
19 have access to all of the computer forensic data that has
20 been produced by the State. Some of those belong to Jim
21 Knapp. Some of them belong to the victim. So obviously, he
22 didn't have access to those.

23 So we just received, as I said, several
24 CDs of material that are still being analyzed that, frankly,
25 I am not sure we are going to have time to analyze. The

1 State had all of these items in their possession for
2 approximately 15 months before disclosing any of these
3 reports to us.

4 In addition to that, we still don't have
5 the EnCase case files, which we specifically asked for, for
6 any of these items. We have specific disclosures that the
7 State decided to make, that the D.P.S. lab decided to make to
8 us, but we don't have case files. So our experts can't do
9 what they need to do to analyze the EnCase disclosures that
10 have been made and the EnCase analysis that has already been
11 performed. So we are not even in a position to analyze what
12 has been done, because it hasn't been properly disclosed to
13 us. So that is our problem with these experts and this
14 disclosure.

15 THE COURT: It is not an issue of whether they
16 are qualified or unqualified as experts. It has more to do
17 with timing.

18 MS. CHAPMAN: I don't think we can get there
19 until we can see what they have done and we can analyze what
20 they have done, and we can't do that until they disclose to
21 us the EnCase case file.

22 We have got partial disclosure that was
23 made late. We don't have complete disclosure of what we have
24 asked for. And what we have received was received so late
25 that I don't think we have time to get through it at this

1 point.

2 THE COURT: Mr. Butner, why do you have these
3 witnesses here for testimony today?

4 MR. BUTNER: I brought them here, Judge, to
5 get them qualified as experts in this case. I thought there
6 might be some disagreement about that.

7 But let me address what counsel has
8 brought up. First of all, they had the same items in their
9 possession for the same 15 months. These computers and so
10 forth were all imaged and they were provided with the same
11 images that the people at D.P.S. use.

12 In terms of the EnCase case files, I am
13 not exactly sure what that is. I know -- and I see the
14 people in the lab don't understand exactly what that is,
15 either. We have provided them with the files and reports
16 that were prepared by the D.P.S. forensic computer lab in
17 connection with their investigation.

18 To my understanding, that is what we have
19 got. I mean, they have the same clone or mirror images that
20 the lab had. They had the opportunity to do the same kind of
21 analysis that the lab had. And in fact, I think they have
22 done significant analysis. And we have provided them with
23 our reports on the analysis that has been done by the lab,
24 and that was done on January 29th, Judge.

25 THE COURT: What is the import of their

1 evaluation for purposes of any particular exhibits?

2 MR. BUTNER: Well --

3 THE COURT: You told me about one, and that is
4 the testimony I previously heard about the computer coming on
5 and switching itself off and some references to the times
6 that were contained in some documentation that Detective Page
7 testified about at one of the prior hearings.

8 MR. BUTNER: Early on. Exactly. Right.

9 And basically, it is a matter of pulling
10 off the e-mails between the parties in this case -- between
11 the defendant and the decedent, a lot of those. That kind of
12 thing.

13 THE COURT: So foundational witnesses for how
14 they went about extracting information that goes back in
15 the -- and whether the information can be trusted as true and
16 accurate within the BlackBerry or the other items.

17 MR. BUTNER: Exactly.

18 THE COURT: And then what -- if there were
19 pertinent communications, what -- they would be foundations
20 for that.

21 MR. BUTNER: These gentlemen are much more
22 highly trained, much more highly qualified investigators than
23 Detective Page, but that is basically their field of
24 expertise, and how these computers work, of course.

25 THE COURT: All right. I don't know that I

1 need testimony from them concerning qualifications, at this
2 point, unless there is really likely to be some dispute over
3 whether they are qualified, have the degrees and experience
4 to provide an opinion. It sounds as though the issue has
5 more to do with precisely what procedures were used --
6 whether the report was disclosed, whether the disclosures are
7 timely and things like that.

8 Am I mistaken in my read of the
9 landscape?

10 MS. CHAPMAN: Your Honor, I think that is
11 mostly true. One issue is that we don't have -- when EnCase
12 examines an item of evidence, it creates an EnCase case file.
13 What an expert imports from that or exports from that is a
14 subjective decision that an expert makes. That is all we
15 have, is that subjective decision-making process. We don't
16 have the whole EnCase file.

17 And so we can't make a determination
18 about whether we have issues about the way the examination
19 occurred or what they did as part of their examination until
20 we get that file. And so that is my only hesitation about
21 saying do we have an issue about the qualification in the way
22 they did the examination. I don't think we can make that
23 determination now, because we don't have the EnCase file.

24 THE COURT: I may have followed you. I am not
25 sure.

1 Do you see a need to have the witnesses
2 testify with regard to that issue from the defense
3 standpoint?

4 MS. CHAPMAN: Not until I get the EnCase file.

5 MR. BUTNER: Judge, I might, because I am
6 sufficiently befuddled at this point in time, that I probably
7 need testimony from one or more of those gentlemen seated in
8 the back of the courtroom there to explain what the EnCase
9 file is and this importing and exporting and so forth, and
10 maybe they can explain it better for all of our edification.

11 THE COURT: And maybe that would be helpful
12 for me to understand what the problem is particularly.

13 You want to have a discussion with them
14 and figure out which might be the best?

15 MR. BUTNER: Exactly. Thank you. I would
16 like to do that.

17 THE COURT: I will take a brief recess to let
18 you do that in an effort to move that part of the hearing
19 along.

20 Obviously, I recognize that you have
21 other issues than just that, from the defense perspective,
22 and I'll have you address those.

23 What other witnesses are here -- people
24 are here for testimony as witnesses?

25 MR. BUTNER: That's it, Judge.

1 THE COURT: Anybody else from the defense side
2 here as witnesses that I am going to have to hear from?

3 MS. CHAPMAN: No, Your Honor.

4 THE COURT: Why don't I take a recess, then,
5 and let you all -- and maybe Mr. Butner with Mr. Sears and
6 Ms. Chapman can pose some of the questions. Maybe the
7 proffered witnesses would be willing to answer some questions
8 that might enlighten you before we get to the part that they
9 need to enlighten me.

10 So we'll take a recess. About ten
11 minutes.

12 (Brief recess.)

13 THE COURT: The record continues to reflect
14 the presence of the defendant, his counsel, and the
15 prosecutor.

16 Mr. Butner.

17 MR. BUTNER: Judge, I think it would be for
18 the edification for the Court and counsel if the State were
19 to call Mr. Randy Arthur to the stand.

20 THE CLERK: Do you solemnly swear upon the
21 penalty of perjury the testimony you are about to give will
22 be the truth, the whole truth, and nothing but the truth, so
23 help you God?

24 THE WITNESS: I do.

25 MR. BUTNER: Thank you.

1 RANDY ARTHUR,
2 called as a witness, having been duly sworn, testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. BUTNER:

6 Q. Please state your name for the record, sir.

7 A. My name is Randy Arthur.

8 Q. What is your occupation?

9 A. I'm a sergeant with the Arizona Department of
10 Public Safety.

11 Q. What are your duties as a sergeant with the
12 Arizona Department of Public Safety?

13 A. Currently, I oversee the Department of Public
14 Safety Computer Forensics Unit. I also am the director of
15 the Arizona Regional Computer Forensics Lab in Phoenix.

16 Q. And how long have you been performing those
17 duties -- and what do you call the lab, again?

18 A. Its called the Arizona Regional Computer Forensics
19 Lab.

20 Q. Okay. How long have you been overseeing the
21 Arizona Regional Computer Forensics Lab?

22 A. For four-and-a-half years.

23 Q. How long have you been with D.P.S.?

24 A. For 25-and-a-half years.

25 Q. Okay. Did you have any specialized education or

1 training to prepare yourself for your duties in overseeing
2 the computer forensics lab?

3 A. Yes. Formal training, I have had 372 hours of
4 computer-forensics related training.

5 Q. Okay. And how long have you been engaged in
6 computer forensics analysis?

7 A. For four-and-a-half years.

8 Q. So in addition to overseeing the lab, you actually
9 work in the lab?

10 A. Correct.

11 Q. And do the dirty work, so to speak, of working
12 with computers and analyzing them from a forensic point of
13 view?

14 A. That's correct.

15 Q. Would you kind of describe for us what this 372
16 hours of training involves.

17 A. Initially, I went through -- and you referred to
18 IACIS a little bit ago -- and that is the International
19 Association of Computer Investigative Specialists -- and that
20 is an 80-hour course that is in Florida. That's an
21 international-level class, kind of like the A-to-Z class for
22 computer forensics. I attended that class.

23 In addition to that, regarding specific
24 software programs we use, EnCase has been mentioned several
25 times here today. I have had two classes in that, an

1 intermediate and advanced-level class in EnCase.

2 Another program we use is called the
3 Forensics Toolkit. It is made by a company call AccessData.
4 I have been to an intermediate-level class in the use of that
5 program.

6 I've also attended four classes that are
7 put on by the National White Collar Crime Center, also
8 referred to as NW3C. That's a national-level federal agency
9 that provides training and expertise to law enforcement in
10 computer crimes and other areas. I have been to four of
11 those classes, some of which have been beginning,
12 intermediate, and advanced level.

13 And also, in addition to that, I have
14 been to two classes that specifically address Apple and
15 Macintosh products.

16 Q. Special classes for Apple and Mac?

17 A. Right. I may be missing a couple, but that is a
18 summary of my training.

19 Q. Let me show you what has been marked as Exhibit
20 166.

21 Do you recognize that?

22 A. Yes, I do.

23 Q. What is it, please.

24 A. That's my CV.

25 Q. Your curriculum vitae?

1 A. Vitae. Yes, I always say CV.

2 Q. It outlines your training and education for your
3 field of expertise?

4 A. That's correct.

5 MR. BUTNER: I'd move for the admission of
6 166.

7 THE COURT: Any objection for purposes of this
8 hearing?

9 MS. CHAPMAN: No objection.

10 THE COURT: There being no objection, 166 is
11 admitted.

12 MR. BUTNER:

13 Q. Now, would you describe for us, please, what kind
14 of analysis you conducted in this particular case on the
15 computers in the DeMocker case, so to speak?

16 A. The only computer I am examining is the Dell
17 laptop computer that belonged to James Knapp.

18 Q. Okay. And what program did you use to conduct
19 that analysis?

20 A. EnCase and FTK.

21 Q. And FTK, is that Forensics Toolkit that you were
22 talking about; correct?

23 A. That's correct.

24 Q. So EnCase and the Forensics Toolkit. And is this
25 pretty much the standard way that you analyze any computer in

1 your lab?

2 A. Yes.

3 Q. And to your understanding, was the same kind of
4 analysis conducted on Mr. DeMocker's laptop computer down
5 there by Mr. Detective Page and Mr. Lindvay overseeing that?

6 A. Yes. There are other additional tools that we use
7 in the lab besides FTK and EnCase -- other forensics tools.
8 And I believe some of other tools may have been used on the
9 DeMocker computer. But most definitely, EnCase and FTK are
10 used on most every computer we analyze.

11 Q. Would you tell us how you begin this analysis. Is
12 there a basic step-by-step process?

13 A. Yes.

14 Q. Please describe that for us.

15 A. I am going to give an overall summary, but I will
16 be as specific as I can.

17 Basically, we get a computer -- the
18 original evidence comes in to our lab. We document that with
19 photographs. We take the hard drive out of the computer, in
20 most cases, and then we make an image of that hard drive onto
21 our evidence server.

22 And when we are doing that image, what we
23 do is we hook the original hard drive up to what we call a
24 write blocker, and that prevents any writes being made to the
25 original evidence. That's -- the most important rule in

1 computer forensics is not to alter the original evidence in
2 any way.

3 And how we can check that is when we
4 image a hard drive, we do it -- actually the EnCase program
5 does it for you. It makes a hash value of the hard drive
6 that we are imaging. It takes a hash value before and after
7 the image is obtained.

8 And hash value, it's a 128-bit algorithm,
9 and the chances of two hash values matching is something like
10 340 billion, billion, billion, billion. It's similar to
11 maybe like a VIN on a car, but a lot less likely that two are
12 going to match.

13 Q. Okay. And you do that to make sure that the
14 original computer is not changed in any way?

15 A. That's correct. That is like the most important
16 thing in our field.

17 Q. And you'd also do that to make sure that your
18 mirror image is exactly the same as the original computer?

19 A. If the two hash values match, we know that our
20 mirror image is an exact duplicate of what was in the laptop
21 or the desk top or whatever we were examining.

22 Q. Okay. And do you have a reference name for this
23 kind of image that you have now constructed? You used the
24 term earlier, when were you talking with me, of an E01?

25 A. Right. EnCase is pretty much the standard in the

1 law enforcement and the private sector. That is probably the
2 most popular computer forensics software that is available
3 out there.

4 And when EnCase -- when you use EnCase to
5 image a hard drive, it produces several E01 files. And E01
6 is just an extension of -- you know, like a Word document is
7 ".doc." An E01 file is EnCase's extension.

8 Q. Okay. And then what do you do after you've
9 created the mirror image and create this E01 file?

10 A. Once we create the E01 files, then we put those
11 E01 files into the EnCase program, and it creates a working
12 copy -- something that you can conduct searches on, you know,
13 keyword searches and Internet history searches. It just puts
14 it into an interface that you can do those kinds of things.

15 Q. Okay. And you did that in this particular case?

16 A. With Mr. Knapp's computer, yes.

17 Q. And you are aware that Detective Page did that
18 with Mr. DeMocker's computer?

19 A. That's correct.

20 Q. And then you do those searches that you've
21 described, I think is what you called them?

22 A. Right.

23 Q. And then what do you do?

24 A. Well, during your case, just based on what you are
25 searching for, some of the searches become very complex. For

1 example, we do keyword searches. Several of them might
2 produce several hundred thousand hits.

3 So what we do is we have to go through
4 those search hits, when we do keyword searches, and we
5 bookmark items that we think are relevant to the case, or we
6 bring in detectives and they go through search hits. And
7 there is a number of different ways to handle that.

8 And then because some of those processes
9 are so memory intensive, as far as on our forensics
10 computers, sometimes we release that information and go on to
11 our next search. So the interface that we use to do these
12 searches and Internet history analysis and so forth, that
13 changes, because we have to conserve our computer memory. In
14 our forensics boxes, it just can't handle that much
15 processing.

16 Q. And do you document this process?

17 A. Yes.

18 Q. How do you do that?

19 A. In our report that we generate that is ultimately
20 given to the prosecutor and the detective -- case detective.
21 Every step that we take, searches that we make, relevant hits
22 that we find, all of those items that I just mentioned are
23 documented in what we call a case file, which is put on a CD
24 and provided to the detective and the prosecution.

25 Q. And is that, basically, your final report on what

1 you have done in regard to that particular computer?

2 A. Yes.

3 Q. And did you do that in this case?

4 A. Not completed. I am working on the final report,
5 as we speak.

6 Q. You are still working on Mr. Knapp's computer;
7 right?

8 A. That's right.

9 Q. And Detective Page, I think, is still working on
10 Mr. DeMocker's computer?

11 A. Yes, he is.

12 Q. And in your capacity as the supervisor of that
13 lab, you are overseeing what Detective Page and Mr. Lindvay
14 are doing in regard to Mr. DeMocker's computer?

15 A. That's correct.

16 MR. BUTNER: I don't have any further
17 questions of this witness at this time.

18 THE COURT: Ms. Chapman.

19 CROSS-EXAMINATION

20 BY MS. CHAPMAN:

21 Q. So you just examined the Dell laptop of Mr. Knapp;
22 is that right?

23 A. That's right.

24 Q. When did you start your examination?

25 A. I think -- I am guessing here -- I want to say

1 October-November time frame.

2 Q. And when did Detective Page begin his examination
3 of Mr. DeMocker's computers?

4 A. I would be guessing. I am not sure.

5 Q. So you don't know when the examination of
6 Mr. DeMocker's computers began in your lab?

7 A. I am sure I do. I don't have that documentation
8 in front of me. But I'm sure -- I wasn't prepared for that
9 kind of question.

10 Q. And you are not complete with your examination of
11 Mr. Knapp's computer; is that right?

12 A. That's right.

13 Q. And Detective Page is incomplete with his
14 examination of Mr. DeMocker's computers?

15 A. That's right.

16 Q. And you mentioned that the most important thing
17 you do in your lab is to make sure that the original is not
18 altered when you make the copy; is that right?

19 A. That's correct.

20 Q. And is one of the ways you do that to remove the
21 power source from the laptop or from the computer when you
22 make the copy?

23 A. Yeah, that's one of the procedures that we
24 normally follow, yes.

25 Q. When you talked about the EnCase case file, that

1 case file contains information about the search process that
2 you go through; is that right?

3 A. Well, I never called it a case file. I don't
4 consider that the case file, because, like I mentioned, it is
5 changing because -- you know, we have a million search hits
6 that maybe we have to go on to the next search before we
7 release search hits and move on to the next search. So to
8 say that is the case file, it's not all-inclusive, because it
9 changes, depending what process you were running.

10 Q. Well, you agree that when you make a forensic
11 image in EnCase, it creates a case file; is that right?

12 A. No, that is not right. It creates EO1 files, and
13 then we put these EO1 files into a GUI or an interface to run
14 processes.

15 Q. And there is a GUI file that contains all of the
16 information about the size of the hard drive, what searches
17 you've run, what error processes may or may not have occurred
18 in the importation process; is that correct?

19 A. Partially. I mean, there is -- finding out some
20 of that information is a process in and of itself. But in
21 general, like I said, I want to -- I don't refer to that as a
22 case file.

23 Q. Well, let's refer to it in your language, then, as
24 an EO1 file.

25 Does the EO1 file contain that

1 information?

2 A. The E01 files -- and there is numerous E01 files
3 when we take an image -- it contains all the data on the hard
4 drive or whatever WIZ that we were imaging.

5 Q. And doesn't it also contain all of the data from
6 the examination that you do on that hard drive or whatever
7 the image is that is being forensically examined?

8 A. The E01 files do not. Those never change.

9 Q. So it's your testimony that when you do a
10 forensics examination in EnCase, there is no file -- there is
11 or no data file or no file that contains all of the
12 information about what the examination that you conduct in
13 your lab does; is that correct?

14 A. That's correct.

15 Q. Okay. So the file that you say -- that you
16 testified about that you produce that contains the keywords
17 and the searches, that's a file that you create by
18 subjectively choosing what to export out into a file to
19 produce to the State and to the defense; is that right?

20 A. We produce a case file that documents every search
21 and every process that we run, and it lists what items were
22 bookmarked of evidentiary value. Obviously, we were not
23 going to document -- if we get a search hit of a word and
24 there is 300,000 search hits, we are not going to document
25 each one of those search hits. We document what is

1 evidentiary value.

2 Q. And that is a subjective process, wherein the
3 examiner determines what the item of evidentiary value is?

4 A. Sure. That is part of our training. The guys and
5 gals that work in the lab have investigative experience. We
6 consult with investigators. Like I said, many times the
7 investigator, him or herself, will come down to our lab and
8 go through search hits, if we don't have enough knowledge
9 about the case.

10 Q. And when that happens, is that documented in the
11 EnCase file that you generate and provide to the State?

12 A. The EnCase file? You mean, the E01 files?

13 Q. The files that you are producing to the State to
14 produce to the defense, when an investigator comes down and
15 helps you bookmark files, is that included in your EnCase
16 report?

17 A. Right. When you say EnCase report, our reports
18 are not just the EnCase report. It is maybe an FTK report.

19 Q. I want to focus on your EnCase examination and
20 evaluation.

21 So when you are doing an EnCase
22 examination, did you just testify that sometimes the
23 investigator will come down and help you assist in making
24 bookmarks; is that right?

25 A. That's right.

1 Q. And when the investigator comes down and assists
2 you in making bookmarks in your EnCase evaluation, do you put
3 the information that the investigator was there in an EnCase
4 report somewhere?

5 A. Yes, if that occurs. Yes.

6 Q. Has that occurred in your examination of the Jim
7 Knapp hard drive?

8 A. No.

9 Q. Has that occurred in the Detective Page
10 examination of Mr. DeMocker's computers?

11 A. Yes.

12 Q. So we should be able to find, then, in the EnCase
13 reports, information that an investigator came down and
14 assisted Detective Page in determining what bookmarks should
15 be created in the EnCase file of Mr. DeMocker's computers?

16 A. Wow, that was a -- I am not sure I follow that.
17 I'm sorry. That was a long question.

18 Q. Okay. You said that an investigator came down and
19 helped Detective Page create bookmarks in an EnCase
20 investigation of Mr. DeMocker's computer; correct?

21 A. That -- I am going off recollection. I mean, this
22 analysis of this computer started quite a while ago. That
23 would be -- I would be guessing, so I would have to --

24 Q. But I thought you just guessed and you said that
25 they had. Are you now saying that didn't happen?

1 A. Well, I am saying in my experience in the lab, we
2 have had detectives come down and help us with that. I am
3 not sure -- in this case, I am not sure if that happened in
4 this case or not.

5 Q. So now you don't know whether an investigator came
6 down and assisted Detective Page in creating bookmarks for
7 the EnCase evaluation?

8 A. I don't recall that. I mean, I have a lot of
9 cases and a lot of stuff going on.

10 Q. Uh-huh. Okay. So is there, then -- I just want
11 to make sure I understand this.

12 You said that when you run a keyword
13 search, you get a lot of hits. You determine which of those
14 to bookmark; is that right?

15 A. Yes.

16 Q. So is there anywhere that would tell us, in an
17 EnCase report or any other kind of report, when you are doing
18 a search in EnCase, what search terms turned up that you
19 didn't bookmark?

20 A. That would be -- basically, yeah, in our final
21 report that we provide, we will list here's the search terms
22 that we ran a search on, and that out of these search terms,
23 we bookmarked "X" number of hits.

24 Q. And that will be in the final report?

25 A. Yes.

1 Q. Okay. And you produced some reports with respect
2 to your examination of Mr. Knapp's computer?

3 A. No, I have not completed that.

4 Q. You haven't produced any because you haven't
5 completed it; is that right?

6 A. That's right.

7 Q. And when do you plan to complete your examination
8 of Mr. Knapp's computer?

9 A. I would say within the next two weeks.

10 Q. And when does Detective Page plan to complete his
11 examination of Mr. DeMocker's computer?

12 MR. BUTNER: Speculation.

13 THE WITNESS: Yeah. I don't know.

14 MS. CHAPMAN: Okay. No further questions.

15 THE COURT: I will take the answer.

16 MR. BUTNER: Sure. He answered it.

17 No further questions of this witness.

18 Thank you, sir.

19 THE COURT: You may step down. Thank you.

20 Any other witnesses that you wanted to
21 present or needed to present?

22 MR. BUTNER: I don't think so, Judge. Thank
23 you.

24 THE COURT: Any of these witnesses that you
25 think I need to hear from in terms of evidence or facts, or

1 is the rest of it legal argument?

2 MS. CHAPMAN: Your Honor, I think the rest of
3 it is with respect to timing. I mean, these computers were
4 in their possession for ten months, apparently, before they
5 started examining them, with respect to some of them. So the
6 issue is what were they doing and why were they waiting to do
7 the examination and why do we not have these reports now?

8 So I don't know if we want to get into
9 that in terms of their testimony, but those are the live
10 issues that we have with respect to this disclosure and our
11 inability to prepare or even respond at this point because we
12 don't have the files.

13 THE COURT: Do you want to make any record
14 with the witnesses or want me to excuse the witnesses?

15 MR. BUTNER: You know, Judge, if we are going
16 to get into the facts about when the examination of these
17 computers started, if we need testimony in that regard, I
18 guess now is the time to do that and maybe we ought to put
19 that on.

20 We know Detective Page has been doing
21 that for a long time, but maybe we ought to have him testify
22 about when he started, just to get that clear. Because there
23 is argument here suggesting that the computer sat down there
24 for eight or nine months and didn't get examined, and that's
25 definitely not the case.

1 THE COURT: I am open to hearing from whoever
2 you want to present with regard to issues that need to be
3 decided.

4 MR. BUTNER: Detective Page, please.

5 THE CLERK: Do you solemnly swear upon the
6 penalty of perjury that the testimony you are about to give
7 will be the truth, the whole truth, and nothing but the
8 truth, so help you God?

9 THE WITNESS: I do.

10 THE COURT: It is 3:15, and I just want to
11 make sure that -- you know, let's stay on the issue that you
12 think you need to make a record of, as determined from the
13 other foundational stuff that may be necessary for another
14 type of hearing.

15 MR. BUTNER: Right. I don't think I need to
16 do that at this point in time.

17 STEVE PAGE,
18 called as a witness, having been duly sworn, testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MR. BUTNER:

22 Q. Please state your name for the record, sir.

23 A. Steve Page.

24 Q. And what is your occupation?

25 A. I'm a detective with the Yavapai County Sheriff's

1 Office.

2 Q. And have you been assigned specific duties in
3 connection with the case of State of Arizona versus Steven
4 Carroll DeMocker?

5 A. Yes.

6 Q. What are your duties?

7 A. To do computer forensics on the electronic or
8 digital storage media involved in the case.

9 Q. And in order to perform those duties, where have
10 you been working?

11 A. I was directed or temporarily assigned to work at
12 the regional -- the D.P.S. Regional Computer Forensics Lab in
13 Phoenix.

14 Q. Down in Phoenix?

15 A. Yes.

16 Q. Is that the lab where Randy Arthur is the
17 supervisor, so to speak?

18 A. Yes.

19 Q. Okay. How long have you been down there?

20 A. I started working down there November 13, 2008.

21 Q. November 13 of 2008. And in connection with
22 performing duties in this case, what have you done?

23 A. I have done forensics examinations on a number of
24 the different digital items of digital evidence that are
25 involved in this case, one of them being Steven DeMocker's

1 laptop.

2 Q. When did you begin analyzing Steven DeMocker's
3 laptop?

4 A. I first began working on that laptop somewhere
5 right on or right after November 13, 2008.

6 Q. And have you been working on that all the time
7 that you have been down there, or have you worked on other
8 things, also?

9 A. No, I've worked on a number of other different
10 things.

11 Q. Okay. Would you describe the percentage of the
12 time that you have spent down there in working on
13 Mr. DeMocker's laptop.

14 A. It would be an approximate guess, but I would say
15 perhaps 25-percent.

16 Q. And the other items that you worked on, what are
17 those, please?

18 A. They involve compact disk or CD and DVD storage
19 datas or items; iPod devices that have been imaged and
20 examined; flash memory devices, which include things like
21 camera flash memory cards and thumb drives and things of that
22 nature; as well as the other computers in the case, and there
23 were four other computers. And I worked on all of that in
24 that time frame.

25 Q. What are the other four computers, please?

1 A. That would be Steven DeMocker's work computer,
2 Carol Kennedy's computer that she was actively using up until
3 the time of her death, and a computer that has been commonly
4 referred to in this case as her "crashed computer," and a
5 laptop -- a Mac laptop -- belonging to, I believe, Katie
6 DeMocker.

7 Q. And so the Mac laptop analysis, that has been
8 completed; right?

9 A. Yes.

10 Q. And have you completed the analysis of the CDs,
11 DVDs, and the iPod devices?

12 A. Not fully.

13 Q. How about the flash memory devices?

14 A. Not fully.

15 Q. And how about the thumb drive?

16 A. Again, not fully.

17 Q. Okay. Have you completed the analysis of the
18 defendant's work computer?

19 A. Not fully.

20 Q. And how about the victim's computer, Carol
21 Kennedy's computer?

22 A. That would be the same. I have not fully
23 completed that.

24 Q. And then the crashed computer that we called it, I
25 think?

1 A. That would be in the same category. I have not
2 fully completed that one either.

3 Q. So when you say that you spent 25-percent of your
4 time on the defendant's laptop, that is compared to the other
5 75-percent that you spent on these other computers and
6 various devices?

7 A. Yes.

8 Q. Is that correct?

9 A. Yes.

10 Q. And did you use the EnCase program as described by
11 Mr. Arthur?

12 A. That is one of the programs I have used, yes.

13 Q. And what other programs have you used?

14 A. AccessData's Forensic Toolkit. I have used a
15 program called CD/DVD Inspector. It's like forensic software
16 program, specifically designed for examining CDs and DVDs. I
17 have used a program called Net Analysis.

18 Q. What analysis?

19 A. Net Analysis. That software is used to
20 forensically examine Internet history, specifically.

21 Q. You used that on Mr. DeMocker's laptop computer;
22 is that correct?

23 A. Correct.

24 Q. And in regard to all of these devices, have you
25 been steadily working on this since November 13 of 2008?

1 A. Yes.

2 MR. BUTNER: No further questions.

3 THE COURT: Ms. Chapman.

4 CROSS-EXAMINATION

5 BY MS. CHAPMAN:

6 Q. Detective Page, so you started working in
7 mid-November 2008, is that right, on this case?

8 A. Yes.

9 Q. And so who was working on the computer examination
10 on this case before you started?

11 A. To my knowledge, Detective Roger Hoover had
12 completed the imaging of the computers prior to when I
13 arrived at the lab.

14 Q. And had he begun any analysis after he completed
15 the imaging?

16 A. I don't know.

17 Q. And so the only item of analysis that you
18 completed -- or the only item that you completed an analysis
19 on is Katie DeMocker's Macintosh computer; is that correct?

20 A. That one, yes, we are through with that one.

21 Q. And you haven't completed analysis on any of the
22 other items that you have been examining?

23 A. No.

24 Q. And so when do you anticipate completing your
25 analysis of what you called, I think, the crashed computer

1 that was at Carol Kennedy's home?

2 A. I don't have a schedule for that.

3 Q. When do you plan to complete the analysis of
4 Carol's computer that she used up until the time of her
5 death?

6 A. I don't have a schedule for that one either.

7 Q. And do you also not have a schedule for
8 Mr. DeMocker's work computer, for completing the analysis of
9 that?

10 A. I don't have a hard and fast date, no. I would
11 not have a schedule for that one either.

12 Q. Do you have any date -- not a hard and fast date,
13 but any date at all that you plan on completing the analysis
14 of that?

15 A. As soon as possible.

16 Q. And other than as soon as possible, no other date
17 that you can provide?

18 A. Correct.

19 Q. And is that true with respect to Mr. DeMocker's
20 laptop and the CDs, DVDs, iPods, and thumb drives?

21 A. Correct.

22 MS. CHAPMAN: I have no further questions.

23 THE COURT: Mr. Butner.

24 MR. BUTNER: Nothing further at this time,

25 Judge.

1 THE COURT: You may step down, Detective Page.
2 Thank you.

3 Any other witnesses?

4 MR. BUTNER: No witnesses, Judge. I think
5 that establishes what has been going on.

6 THE COURT: Did you see any need to keep your
7 witnesses around?

8 MR. BUTNER: No.

9 THE COURT: May they be excused?

10 MR. BUTNER: They may be excused if they wish
11 to be. Thank you.

12 THE COURT: Miss Chapman, are you okay with
13 that, also?

14 MS. CHAPMAN: I am, Your Honor.

15 THE COURT: Thank you, gentlemen, for being
16 here. You are excused, if you wish to be, or stick around,
17 if you wish.

18 Any other witnesses you think I need to
19 hear from in connection with any of the motions?

20 MR. BUTNER: I don't think so at this time,
21 Judge.

22 THE COURT: Okay. Let me hear a couple of
23 issues, if you are ready to take them up on -- because I
24 think they are things that I should get done today, because
25 they are important for us to keep on schedule. And that is

1 defendant filed a motion for release of medical records,
2 pursuant to 12-2294.01.

3 On February 5th, 2010, I received a
4 response in objection and a reply in connection with that
5 one. The reply came in the day before yesterday.

6 But since that deals with something that,
7 if you are going to obtain it, we need to be done rather fast
8 to keep the case on schedule, I would like to hear from you
9 now.

10 MR. SEARS: Thank you. Judge, the State,
11 among other things, dismisses the idea that we need to
12 investigate anything about Mr. Knapp, because the State has
13 concluded that he is not a suspect, and we should fall in
14 step with that and give it up. That certainly misstates the
15 law. We are not satisfied that the State's investigation
16 regarding Mr. Knapp's role in this case in a number of
17 different places was done correctly.

18 We now know, from Detective Page, that
19 they're not done with a major part of the investigation,
20 which is the analysis of Mr. Knapp's computer, which they
21 have had -- or law enforcement has had since his death in
22 January of 2009, about 13 months ago in this case.

23 We don't think the State has any standing
24 to involve themselves in this. I think the State mistakenly
25 thought that we were asking them to produce these records in

1 this case.

2 The statute that we've talked about is a
3 statute that we are required to implicate to get those
4 records released, and the only reason we filed the
5 application for a court order is because that is what is
6 required under Title 12 in this case.

7 Mr. Knapp, for what it is worth, told
8 many people, including the victim in this case, that he was a
9 cancer patient. There was some indication at autopsy in
10 Mr. Knapp's case that he had some evidence of cancer surgery.
11 Mr. Knapp variously told people that he was dying of cancer
12 and repeated that over and over again to a number of people.

13 He then, toward the end of his life,
14 began to tell people he was miraculously cancer-free. Among
15 the people that he told he was dying of cancer were the
16 DeMocker children in this case.

17 Mr. Knapp's medical records are part of
18 our investigation of him and his role in this case. We have
19 given notice to the holder of those records -- both of our
20 motion, of our reply, as we are required to do under the law.
21 This is simply something we are entitled to do. The State
22 has been seeking --

23 THE COURT: He is deceased. Did he leave any
24 next of kin or anything like that?

25 MR. SEARS: He had an ex-wife and two minor

1 children, that we know of. We are not aware of any probate
2 proceeding in his case. I don't believe that they are
3 required, under the statute, to be given notice in this case.

4 I don't think they have any privilege
5 that they can assert with respect to his records. I think
6 it's simply a matter of the statute in this case. It is part
7 of our investigation.

8 There are many things about Mr. Knapp and
9 Mr. Knapp's involvement in this case that are still of great
10 interest to us. We are disappointed that they're not of
11 similar interest to the State, but that's their concern. So
12 I would ask the Court to sign the order.

13 THE COURT: Obviously, I have background on
14 who Mr. Knapp was and what his connection was to the case
15 from previous hearings and such.

16 Mr. Butner, Mr. Papoure, whoever cares to
17 address --

18 MR. PAPOURE: Your Honor, I will address the
19 issue on this particular issue.

20 The defendant filed a motion and outlined
21 four reasons why they believe decedent Knapp's records are
22 necessary. And the reasons given in defense's motion is
23 that: One, is because he allegedly lied to the police about
24 his knowledge of and interactions with the defendant; two,
25 that he was the first person on the murder scene; three, that

1 he committed suicide some six months after the murder and/or
2 that he had unrestricted access to the crime scene.

3 And I don't know if those four reasons
4 are true or not, but I do know that Mr. Knapp's medical
5 records would not answer those questions. There is no
6 possible way that whether or not he had cancer or whether he
7 was cancer free will lead to any admissible evidence as to
8 why they are seeking the records.

9 The purpose for the requested records is
10 not relevant, and that is what the State's argument is.
11 Mr. Knapp does have a brother, a Robert Knapp -- he is a
12 resident of Hawaii -- and he has two minor children.

13 What his medical records were six months
14 before the homicide of Carol Kennedy has nothing to do with
15 the purposes for which the defense is seeking discovery of
16 the records. Apparently, Mr. Knapp went to the Mayo Clinic
17 some six months before the murder and had a complete
18 diagnosis of his medical condition.

19 THE COURT: How do we even know that?

20 MR. PAPOURE: It's my understanding that Carol
21 Kennedy took him down there. And I think maybe through some
22 of the investigation this information appears in the DRs. So
23 approximately six months before the homicide, he is brought
24 to the Mayo Clinic in Phoenix and given a complete physical
25 examination, and that's the records that they are talking

1 about.

2 THE COURT: Any idea of whether there was
3 subsequent follow-up treatment through Mayo or other?

4 MR. PAPOURE: You know, I am not aware of any
5 follow-up treatment. The only follow-up medical reports, I
6 guess, would be -- occurred when he committed suicide some
7 six months after the murder.

8 THE COURT: And then there was an autopsy done
9 by, probably, Dr. Keen?

10 MR. PAPOURE: That's correct. And so we have
11 about a year's period of time for medical records, and right
12 in the middle of that year is the homicide of Carol Kennedy.

13 So the Mayo Clinic records generated six
14 months previous to the homicide are not going to answer any
15 of the defense's questions, are only going to be brought into
16 a case perhaps made public unnecessarily, and Mr. Knapp has
17 surviving kin. There is simply no relevant purpose for the
18 order of a disclosure of Mr. Knapp's records so far before
19 the murder, and they will not answer the four questions posed
20 in the defendant's motion asking this Court to order them.

21 THE COURT: What is the State's interest in
22 whether the defense does or doesn't get those materials?

23 MR. PAPOURE: No. 1, I think one of the
24 primary reasons is that they are not relevant to this case.
25 They're not relevant to the homicide.

1 No. 2, he has surviving kin. Children.
2 And they have not been contacted or their guardians have not
3 been contacted, as far as the State goes. And you know,
4 there is just -- to me it's an attempt to cloud issues that
5 are not even there. And Mr. Knapp's medical records are
6 simply not necessary or part of this case.

7 The State's cited the Conner case in
8 where a murder occurred -- this occurred in Tucson, Arizona,
9 and the defendant was seeking disclosure -- in this case, the
10 victim's medical records. Because he was quite, apparently,
11 intoxicated, they wanted to -- that was some of the records
12 that the defense was trying to bring in.

13 And the Conner case says that the victim,
14 who was deceased, could not testify, and thus there was no
15 reason to discredit his ability to actually perceive events.
16 Mr. Knapp cannot testify. There is no way to discredit
17 his -- the statements that the defendant is saying that he
18 made or he had access to the scene or his interactions.

19 The medical records are not going to
20 address those issues, so they are not necessary. They are
21 not relevant, and the State would ask that the Court deny the
22 motion.

23 THE COURT: Mr. Sears.

24 MR. SEARS: Thank you, Your Honor. Again, to
25 be clear, this is not a discovery motion. This is a motion

1 contemplated by a statute that is not even part of the
2 criminal code that -- that is a step that we have to take
3 procedurally to get records that we could not simply obtain
4 by subpoena. That is why we are before the Court. I think
5 the Court's question of the State is well taken. What is the
6 State's interest in this case?

7 Questions of relevancy wouldn't even be
8 particularly material if this were a Rule 15 discovery
9 motion, if we were looking for the victim's records, for
10 example, as the case that Mr. Papoure talks about involved
11 matters which are for another day. If these records are
12 obtained and would produce information, then the question
13 becomes, at trial, if whether there is any information that
14 is relevant.

15 Let me see if I can quickly connect the
16 dots, here, for Mr. Papoure, who is new to the case, why
17 Mr. Knapp is important in this case.

18 Mr. Knapp lived on the property. He
19 lived approximately 50 yards from where the body was found.
20 He appeared on the scene minutes after the police first
21 arrived. He behaved erratically that evening. He made
22 statements to the police. He made later statements to the
23 police that included such fanciful ideas as the one that I
24 was present that night and was shouting at Mr. DeMocker to
25 stop talking because he was changing his story.

1 When confronted by the police with the
2 fact that I was, of course, not there that night, Mr. Knapp
3 backtracked and said that his memory was poor. Mr. Knapp's
4 alibi was not investigated. For days and then weeks, his
5 alibi involved the claim that he was baby-sitting his
6 children at the home of his ex-wife in Prescott and could not
7 have been at the scene.

8 We contend, without going into great
9 detail, that there are still serious questions about the
10 veracity of that alibi that might not support the idea that
11 Mr. Knapp was someplace else.

12 Mr. Knapp had a documented addiction to
13 prescription drugs. That comes from his divorce files in
14 this case. He was not permitted contact with his children
15 for a period of time, and then was only permitted limited
16 contact, including the day of Carol Kennedy's death, with his
17 children, as a result of his substance abuse problems.

18 We know from his own statements in his
19 own e-mails -- there was something like 51,000 e-mails
20 located on his hard drive, that the State is still looking
21 at, that he took any number of serious prescription pain
22 killers. There was a toxicology report done from his autopsy
23 that showed any number of prescription drugs on board,
24 including drugs that appeared to be contraindicated for both
25 anxiety and depression at the same time.

1 Mr. Knapp contacted the DeMocker
2 children, particularly Katie DeMocker, after their mother's
3 death, in what amounted to an arduous shakedown of the
4 DeMocker girls for money, claiming, in part, that he was
5 dying of cancer and needed money from them variously for
6 expenses related to his treatment so that he could have
7 necessary medical care or, alternatively, to give his
8 children one last Christmas. This would have been in 2008.

9 There are many, many unanswered questions
10 about Mr. Knapp's death. The medical examiner ruled it a
11 suicide. There are serious questions about the nature and
12 extent of the investigation done by the Prescott Police
13 Department in this case, about the manner of his death, the
14 circumstances of the scene, the open door, the unexamined
15 fingerprints, the failure to do ballistics on either the gun
16 or Mr. Knapp's hand, and many, many other things that make us
17 continually and deeply interested in Mr. Knapp in this case.

18 So to connect the final dot, the question
19 of whether or not Mr. Knapp is a viable suspect in this case
20 remains an open question to the defense. The prosecution
21 long ago looked away from Mr. Knapp for reasons we think are
22 inappropriate. Part of our investigation of Mr. Knapp is the
23 need to assess the credibility of what he has said, what is
24 documented in e-mails, what other witnesses would say
25 Mr. Knapp told them about his medical condition.

1 We are getting a picture of Mr. Knapp,
2 unfortunately, over the course of this investigation, that
3 puts him closer to the center of this case rather than
4 farther. The State doesn't share that view. We think the
5 trial in this case will demonstrate that that was a mistake,
6 that the State should have looked more carefully at Mr. Knapp
7 in this case and should have done many things that were not
8 done in this case with respect to him.

9 The State seized on Mr. DeMocker because
10 he was, in their view, the obvious suspect, the easiest
11 suspect, the so-called low-hanging fruit. But for some
12 inexplicable reason, took a different view of Mr. Knapp who
13 lived closer to the scene, had more contact with the victim.
14 The State has built a case against Mr. DeMocker, as they say
15 repeatedly, based on motive and opportunity in this case,

16 I think the evidence in this case
17 suggests that they could have looked more carefully at
18 Mr. Knapp as a person that had motive, opportunity, and means
19 in this case.

20 We don't need the State's consent --

21 THE COURT: What are you looking for in
22 terms -- this doesn't have any particular time restrictions
23 on how old the records could be. And you may have
24 information that is not part of what has been applied for
25 that puts any kind of temporal limitations on how far back

1 Mayo goes.

2 MR. SEARS: We don't know. We don't know. We
3 know the ending. We know it's the date of Mr. Knapp's death
4 in January, 2009.

5 We don't know when Mr. Knapp first went
6 to the Mayo Clinic for this. For all we know, there would be
7 other records that would be important for us in understanding
8 Mr. Knapp's circumstances in this case.

9 THE COURT: You don't have anything in the
10 proposed form of order, either, with regard to secondary
11 dissemination.

12 MR. SEARS: We would be happy to agree to keep
13 that within the defense team unless and until it becomes
14 evidence that either needs to be disclosed or used, and we
15 would seek leave of Court to do that.

16 THE COURT: I will sign the proposed form of
17 order that provides for a protective order with regard to
18 secondary disclosure. I think that you've established a
19 sufficient basis for making an inquiry. So I will enter the
20 order when you provide me with the copy of the one that meets
21 with my concerns for privacy on the part of the now deceased
22 Mr. Knapp.

23 MR. BUTNER: Judge, if the defense is going to
24 get those records, we certainly would ask that they be
25 ordered to provide us with a complete copy.

1 THE COURT: Any issue with regard to that?

2 MR. SEARS: You know --

3 THE COURT: If you are invoking the power of
4 the Court to obtain them, I think that is probably a fair
5 resolution of it.

6 MR. SEARS: I am not sure. I think Judge
7 Kiger used to call this the goosey-gander objection. The
8 State has issued a number of subpoenas, some of which have
9 produced records which have been disclosed to us. But we
10 have no way of knowing whether the subpoenas, which is an
11 order of the Court, has produced records that have not yet
12 been disclosed to us.

13 I think a better approach, and the one I
14 would prefer, Your Honor, is to simply provide the records to
15 us, subject to the protective order. And to the extent that
16 we would ever propose to use those records in any way in this
17 case, at that time we would then disclose them to the State,
18 subject to a similar protective order.

19 MR. BUTNER: Judge, that is not acceptable,
20 and this isn't the goosey-gander argument.

21 I am holding here a 65-page Bates-stamped log
22 of what the State has been disclosing to the defense at every
23 step along the way. 18258 is the last number in this log.
24 We have been disclosing with regularity, basically,
25 everything that we get.

1 And to act like we haven't been regularly
2 disclosing everything we get is disingenuous at the least by
3 counsel. We simply want a copy of what they are getting in
4 this case, and I don't think that that's too much to ask.

5 THE COURT: Well, you are subject to the same
6 secondary disclosure prohibitions, and I am going to do my
7 best to protect the interests of the family of Mr. Knapp from
8 secondary disclosure, if there is nothing in these files that
9 is particularly relevant.

10 So I will enter an order that provides
11 for your office, Mr. Sears, to make a copy immediately of
12 what is received and then provide that within the next two
13 days after you receive it to the County Attorney's Office.

14 MR. PAPOURE: Could I ask that the order also
15 contain some protection language so that these records are
16 not copied and disseminated? He does have kin.

17 THE COURT: That is what I just said.

18 MR. PAPOURE: Okay.

19 THE COURT: That is what I wanted in the order
20 is a non-dissemination provision.

21 I think I am going to put some degree of
22 temporal limitation on it of July 2nd of 2007, so a year
23 before this, just so that we're not fishing for something
24 that is -- you know, I don't know when he saw Mayo, but I
25 don't want to place an obligation on them for a time frame

1 that is not particularly relevant to the offense in the case.

2 MR. SEARS: Your Honor, my only thought is it
3 is probably a very simple matter to them to look him up by
4 patient ID and to get a start date for that. And what they
5 have is --

6 THE COURT: I will direct the order provide
7 when services started, and if you need to follow up and get
8 some additional information based on that, that predates
9 their records that they do provide to you -- that predates
10 July 2nd, the year before the offense -- I will consider
11 additional orders.

12 MR. SEARS: So we can provide you with a form
13 of order that orders Mayo to produce records from the date
14 treatment began or the later date -- the other date of
15 July 2, 2007?

16 THE COURT: Whichever occurred first. Either
17 the date of July 2nd, 2007, or when treatment began.
18 Obviously, if he didn't go see them until January of '08,
19 they don't need to harken back to that, to put some degree of
20 relevance limitation on it temporally.

21 MR. BUTNER: Speaking of relevance, this
22 particular order and this ruling by the Court doesn't address
23 the issue of relevancy at the trial of this matter concerning
24 Mr. Knapp's medical records, et cetera?

25 THE COURT: It doesn't.

1 MR. BUTNER: Okay. Thank you.

2 THE COURT: Looking for what may be relevant
3 evidence.

4 So, as soon as you get that to me, I will
5 sign it.

6 So I think I have covered the Page and
7 Kennedy, and to whatever extent it is, Mascher, from the
8 standpoint of expertise. But what I haven't covered is the
9 motion to preclude. And unless you have something else other
10 than taking care of the medical records issue, as well -- if
11 you think that the psychological issue is something that we
12 can take up very fast, I can take that up. If you think that
13 we need to get that done earlier, it --

14 MR. SEARS: I am thinking in the interest of
15 getting resolution on this very important motion regarding
16 late disclosure, we will just go ahead and respond in due
17 course to this idea that Mr. Knapp's character evidence
18 should be precluded under 608, and also this idea that
19 Mr. DeMocker should be subject to a psychological
20 examination. I think that the responses to that are pretty
21 straightforward, and we will just file them when they are
22 due.

23 THE COURT: I think we discussed the
24 evaluation on the previous occasion, although I can't
25 identify for you right now on --

1 MR. SEARS: November.

2 MS. CHAPMAN: November 14, Your Honor.

3 THE COURT: -- what date that was.

4 Thank you. I appreciate the education as
5 to when that occurred.

6 I think I had raised the issue, and
7 neither side saw a particular basis for asking for it at that
8 time.

9 MR. SEARS: Judge, here is what we would say,
10 and maybe the State will rethink their position.

11 If you look at 13-753 and 754, 753 deals
12 with Atkins issues -- mental retardation, which I don't think
13 anyone has suggested has any place in this case.

14 754 requires a finding of the existence
15 of reasonable grounds to conduct an examination of the
16 defendant's competency and whether the defendant was sane.

17 The way we read the State's motion is
18 they are looking for an objection by the defendant, which
19 they will then claim precludes raising this argument in
20 post-conviction proceedings under both of these statutes. I
21 don't think we get to that question unless the State can come
22 forward and present evidence to the Court to get the Rule 11
23 pre-screening, to show that there is any reasonable ground to
24 exist that there is a question about the defendant's
25 competency or whether he was sane at the time he allegedly

1 committed the offense.

2 If this were not a capital murder case, I
3 doubt seriously that the Court would sua sponte order a Rule
4 11 pre-screen absent either a request from the defense
5 counsel to have his own client examined or some offer of
6 proof from the State or something from the Court's own
7 observations of the defendant or something about the defense
8 that would do that.

9 We do not intend to file an objection so
10 the State can then claim preclusion of issue later on. We
11 think the burden is on the State, at this point, to come
12 forward with some evidence that would give the Court
13 authority, under 754, to order even a pre-screen.

14 THE COURT: Well, as I already said, I raised
15 this with both sides, and I guess it was back in November,
16 based on what you are telling me. Because 13-754 says if the
17 State files a notice of intent to seek the death penalty,
18 unless the defendant objects, the Court shall appoint a
19 psychologist or psychiatrist. It doesn't say that there has
20 to be reasonable grounds. It says "shall appoint a
21 psychologist or psychiatrist licensed pursuant to Title 32 to
22 conduct a pre-screening evaluation to determine if reasonable
23 grounds exist to conduct another examination to determine the
24 following," and then proceeds to talk about competency or
25 sanity. So -- which is why I raised it. I already took it

1 as an objection, based on what you all told me back at the
2 prior time, which I now have had the benefit of having
3 identified as November 14.

4 I received an objection at that time from
5 you. I agree with you. I don't see a basis, in all honesty,
6 for questioning Mr. DeMocker's competency or sanity. I
7 think, though, 754 is talking about if they notice the death
8 penalty, unless defendant objects, I am supposed to order
9 one. I took it from our previous discussions defendant was
10 objecting to that, so I didn't order one. And I was a little
11 miffed, I suppose you could say, when I saw this was being
12 requested at this stage of the proceedings.

13 But anyway, I think you've already
14 objected to it, I think I already refrained from ordering it,
15 because you did object to it.

16 MR. SEARS: Your Honor, I --

17 MR. BUTNER: Judge -- excuse me for a
18 minute. Let me enter something clearly here.

19 I didn't understand that there was
20 clearly an objection on the record as a result of that
21 meeting. And it was in chambers, at the time, and I remember
22 it --

23 THE COURT: Yeah, it was in chambers. I don't
24 know if it was on the record or not.

25 MR. BUTNER: I don't either.

1 THE COURT: I've tried to put everything on
2 the record --

3 MR. BUTNER: I realize that.

4 THE COURT: -- so I think it's on the record.
5 But I guess we could confirm that.

6 MR. BUTNER: But nevertheless, I just heard
7 Mr. Sears say they didn't enter an objection. And I realize
8 this may be merely a pro forma kind of a thing, but it is
9 statutory pro forma kind of a thing, and so that is why I
10 filed the motion.

11 THE COURT: All right.

12 Miss Chapman, do you have something to
13 elucidate?

14 MS. CHAPMAN: Your Honor, there is a record.
15 We have a transcript from the November 14 hearing. There is
16 a transcript of it available, so it is on the record. I will
17 leave it at that. We can look at the transcript in terms of
18 what it says.

19 As an initial matter, we want to make an
20 objection to the constitutionality of that provision.
21 Competence is something that can be raised and has to be
22 raised by counsel or the Court anytime there is an issue, not
23 just as a pre-screening. So I want to be clear about
24 preserving that objection. I don't know if we did that then.
25 I want to make sure we are doing it now.

And I don't read in 754 and in 753 that there is any consequence to our objection in terms of preclusion. So to the extent that there is no consequence in preclusion later on -- you know, at that time that we talked about it, no one saw a need for it in November, and I don't think anything has changed since then.

THE COURT: Well, the Court doesn't see any greater need based on any behavioral or other aspects of the case in my observations of Mr. DeMocker. And counsel certainly would have a legal obligation to bring to the attention of the Court and an ethical and moral obligation to bring to the attention of the Court if there was an issue with regard to competency or if there was a request for determination of sanity.

So as I say, I took your position stated, I think at that time by Mr. Sears in chambers, that that was an objection, at least at that time, to conducting that kind of an evaluation, and that is the reason why I didn't order it. I don't know that there would be any ramification. That's crossing a lot of different bridges to even get to the point where it becomes an issue.

But I am going to decline to order an evaluation of Mr. DeMocker under 13-754 for the reason I think that there was already an objection to it.

As you say, the language probably speaks

1 for itself. But I took it as an objection. If you want to
2 call it something different at this point, I am open to
3 hearing it. And I don't hear any other clarification of what
4 was said.

5 Okay. So I'm going to treat that
6 as -- and I recognize the objection that you are making on
7 constitutional grounds, and I think that you preserved that
8 issue, as well.

9 So I will deny the State's motion, filed
10 on February 18th, with regard to appointment of a
11 psychological expert.

12 The character evidence, I will wait for
13 the defendant's response.

14 So let's move back to the February 5th
15 motion to preclude.

16 I think, Ms. Chapman, you had that one.

17 MS. CHAPMAN: Your Honor, I do. I guess, as
18 an initial matter to start with an overview, this is an issue
19 we have been raising with Your Honor since the beginning of
20 this case. You had initially set a date of June 22nd, and
21 when that date wasn't met, we set another date for the
22 Chronis hearing. And I think it is really a question of
23 repeated failure to disclose what is in the State's
24 possession when it comes into their possession.

25 And we have provided very specific dates

1 and times when things come into the State's possession and
2 when they are disclosed to us, and where it is available.
3 The State continues to say that they timely disclosed it, but
4 doesn't address the dates and times when things are received
5 to them and then disclosed to us.

6 I think that under 15.7 Your Honor has
7 the obligation to impose a sanction of where the disclosure
8 obligations have been not met, and I think in this case both
9 the Rule 15.7 and Your Honor's orders have been repeatedly
10 defied by the State and that they continue to be defied by
11 the State. So I want to just go through the specific
12 examples that we talk about in the motion. We can go one by
13 one. And I can go through the order that we talked about
14 them in the motion.

15 Perhaps, if you just want to take a
16 moment to talk about the Tucker case, because I think it is a
17 really illustrative case. You know, in Tucker, the Supreme
18 Court said they were not going to reverse the trial court's
19 decision not to sanction the State, but said the trial court
20 has a responsibility to make those sanctions and that they
21 shouldn't be treated as a paper tiger. I think the State's
22 citing to Tucker as an excuse for their behavior is really
23 telling because it calls upon the Court to do something. And
24 I think the Supreme Court said don't let the sanctions be a
25 paper tiger, and that is essentially what the State is daring

1 the Court to do.

2 So with respect to the D.P.S. disclosure,
3 we have been asking for months for the protocols and audits
4 from D.P.S. We have to have those protocols and audits in
5 order to review the hundreds of D.P.S. reports that have been
6 disclosed in this case. We finally received them, after we
7 have been asking for them for months. It was disclosed late,
8 and that is what we have in order to review and evaluate and
9 for our experts to review and evaluate the reports.

10 We also, apparently now, after several
11 months of asking, have a late admission from the State that
12 the D.P.S. lab fails to comply with the DNA advisory board of
13 quality assurance standards that require a corrective action
14 law. We have been asking for a corrective action law for
15 months. In fact, we specifically stated in the first request
16 if you don't have one, please tell us that you don't have
17 one. They didn't do that until their reply in this matter,
18 which was after the disclosure deadline that Your Honor
19 ordered of January 29.

20 With respect to the STR frequency tables,
21 which are used to draw conclusions in the reports, the first
22 response that we got after Your Honor ordered the State to
23 disclose it was that they weren't going to disclose it,
24 because it was the property of the FBI. And then when we
25 pointed out to the State that they had previously disclosed

1 other tables that were relied on in other reports, they cited
2 two articles without producing those articles.

3 So again, Your Honor, you order them to
4 disclose items. We have asked for the items for months.
5 They shouldn't require an order of disclosure. They should
6 disclose it pursuant to 15.7. And even when Your Honor
7 orders disclosure, they refuse to disclose it.

8 We can't do the work we need to do to
9 look at their analysis of the DNA in this case when there are
10 literally hundreds of reports without the requested
11 information and the ordered information. And there is
12 absolutely no reason -- they don't even offer a reason for
13 why they continue to fail to comply with the order.

14 THE COURT: What's the date that you received
15 the audit protocol information?

16 MS. CHAPMAN: February 1st.

17 THE COURT: Thanks.

18 MS. CHAPMAN: With respect to the cell phone
19 information, Your Honor, you know, we had asked for a long
20 time -- and I know Your Honor may recall we asked several
21 times for this information regarding cell tower data that we
22 could tell from the disclosure the State had that we didn't
23 have.

24 We were repeatedly told that we did have
25 everything that had been disclosed. And now on February 1st,

1 we receive a report from November 9th with respect to
2 Mr. Knapp and the cell tower data. Now again, the State says
3 well, that is not important to you. But you just heard from
4 Mr. Sears why we think where Mr. Knapp was during the murder
5 is important and continues to be a focus of our
6 investigation, even though it is apparently not a focus of
7 the State's investigation and never was.

8 So again, we just received that February
9 1st. We have been asking for it repeatedly for months, and
10 they have had it in their possession since November 9th.
11 This isn't a case where suppression or exclusion of the item
12 is going to do us any good. It is a case where we needed
13 that information to provide to our experts to do the good
14 work that they need to do.

15 I am going to jump around a little bit
16 from the order in the motion, but I want to talk a little bit
17 about the indexing system. Your Honor will recall that you
18 ordered the State to provide documentation and data about
19 what indexing systems the fingerprints and DNA have been
20 tested in. You ordered that to be done by January 29.

21 On February 1st, we received -- excuse
22 me, I think it was January 29th that we got the response on
23 this -- that there weren't any fingerprints of value. Well,
24 that was confusing to us, because we had received reports
25 from D.P.S. that there were fingerprints of value that had

1 been tested twice in the Arizona system. So our question
2 was: When else had they been tested? These tests were done
3 in August of 2008. There were two separate fingerprints. We
4 want to know when else they had been tested and in what other
5 systems. The State has never responded to that.

6 Again, their first response was, well,
7 there were no fingerprints, and when we pointed out that
8 their prior reports indicated that there were, in fact,
9 fingerprints, they said, well, we have provided those in our
10 reports.

11 So I don't know if that means they have
12 never tested the fingerprints found at the crime scene since
13 August of 2008 and that they've never tested them in anything
14 other than the Arizona index. If that is the case, we find
15 it deeply disturbing, and we would like them to confirm that.
16 They still haven't done it. Your Honor ordered them to do it
17 by January 29.

18 With respect to the DNA database, they
19 continue to tell us, well, it is in CODIS. Their reply tells
20 us that when they enter it into CODIS, a document is created.
21 And we had asked for that documentation, and Your Honor had
22 ordered that documentation to be produced by January 29.

23 We still, sitting here today, don't have
24 that documentation. We have a CODIS protocol now, but we
25 don't have the documentation created when this profile was

1 put into the CODIS system. Your Honor ordered that to be
2 disclosed. We've been asking for it for months. We still
3 don't have it.

4 With respect to the forensic testing,
5 Your Honor has repeatedly, on at least two occasions that I
6 can find in the record, asked the State to provide the
7 defense with a list of what items from the 14 remain to be
8 tested and what tests remain to be done. As opposed to
9 complying with your order, the State said that two items
10 remain to be tested, with no information about what tests are
11 to be performed. I don't know how it is conceivable that
12 they thought that complied with your order. They still
13 haven't complied with the order by providing that information
14 in the reply.

15 Your Honor, with respect to the
16 defendant's statements, this is another order that the State
17 has refused to comply with. I noticed that they filed an
18 amended response today, and I really, honestly can't tell
19 what it means. We got over a thousand summaries of jail
20 calls that they had been producing or, I guess, summarizing
21 since '08 that we got on January 29.

22 None of those calls have been identified
23 in the disclosure as calls they intend to use. Your Honor
24 had required them to identify by date and time and any other
25 identifier what calls they intend to use, and Your Honor told

1 them that if they didn't do it, they would be precluded from
2 using them. As far as I can tell, they haven't done it. If
3 they did it, it is in a way that is indiscernible to the
4 defense. And if that information is in the amended reply,
5 that would be helpful. But again, I cannot tell what the
6 amended reply means or says with respect to this issue.

7 With respect to the experts, Your Honor,
8 and the 15.1 disclosure, you have issued three orders, now,
9 with respect to Mr. Echols. And you have specifically told
10 the State that providing a list of documents is not
11 sufficient -- documents by category is not sufficient. Well,
12 that is what the State continues to do to this day.

13 Your Honor had provided a date by which
14 they needed to comply with respect to Mr. Echols' report and
15 a date by which they needed to comply with respect to what
16 testimony Mr. Echols would provide at trial. The State
17 provided a list of documents, much in the same manner, only
18 longer than the initial list they provided, with no Bates
19 numbers. This is precisely what Your Honor said would not be
20 sufficient, and at this point, we are asking you to exclude
21 Mr. Echols from testifying altogether. He's previously
22 provided testimony that was well beyond the scope of his
23 expertise.

24 The State has been ordered, now, to do
25 this three times. We have no way to prepare for his

1 testimony, no way to interview him, no way to prepare our own
2 experts. And it is just inconceivable at this point that he
3 should be permitted to testify based on the repeated orders
4 and repeated defiance of the State.

5 This also applies to other experts.
6 Castle, I guess is no longer an issue. Costler, who was a
7 newly disclosed expert, who has now been replaced by another
8 expert -- I think we received that disclosure last night --
9 and Mr. Pitt.

10 With respect to the 15.1 disclosure that
11 you have ordered the State to make with respect to different
12 experts other than Echols, with respect to these experts,
13 Costler and Pitt and now, I guess, Costler's replacement, we
14 get things like summary of financial records and all
15 contacts, including e-mails and text and notes between
16 Miss Kennedy and Mr. DeMocker. These designations are
17 meaningless to the defense. We have no way to identify from
18 between the thousands and probably tens of thousands of
19 e-mails and text that have been seized by the State whether
20 we even have them and which ones they would be. We also
21 don't know what summary is being referred to and whether it
22 has been produced to us.

23 We have three months to go, and Your
24 Honor has told the State what would be acceptable and what
25 wouldn't be acceptable in terms of 15.1 disclosure, and they

1 haven't done it. So, Your Honor, at this point, I think with
2 respect to all of those issues, we are asking Your Honor to
3 issue orders of preclusion of those witnesses, to exclude
4 that testimony based on the State's repeated failures to
5 comply with the orders and with Rule 15.

6 There is a whole other category of late
7 disclosure, and those are witnesses. There are six witnesses
8 that have been previously identified with an "N," and I
9 provided Your Honor with an attachment with what has been
10 provided to us.

11 When Your Honor asked the State to
12 provide, back in November, a narrow witness list, they gave
13 us a list, and they had put "N" next to people that we
14 thought were not going to be called. They have now added
15 those six people to their list. In addition to that, they
16 have added 12 additional people that have never previously
17 been disclosed to us. Those include six people from a back
18 country search team that have been known to the State for
19 over 15 months.

20 And there is no reason why they couldn't
21 have been disclosed before now. The State offers no reason
22 why they couldn't have been disclosed before now. And we are
23 talking about a universe of witnesses, Your Honor, that is
24 141 witnesses with over 25 experts at this point.

25 Richard Ach, who they just recently

1 disclosed, was known about since September of '09, was
2 disclosed to us on February 1st.

3 Brian Fagen, who was an FBI person, was
4 known to them in April of '09, not put on the witness list
5 until February 1st. The report from Mr. Fagen and from the
6 FBI witness, who Mr. Butner referred to earlier -- I think
7 it's Mr. Gilkerson -- who is a newly disclosed expert, was
8 provided to the State in October of 2009, and not provided to
9 us until February 1st. And that is true, even though we were
10 litigating the precise issue of these shoeprints in this
11 Court and through motions to this Court while the state had
12 that evidence, that report, those contacts, and didn't
13 provide it to us.

14 And the contact with Mr. Richards and
15 Mr. Day and Mr. Lantz, all of whom were just disclosed in
16 February for the first time to the defense, all came out of
17 that April to October 2009 contact with the FBI, which wasn't
18 disclosed again to the defense until February.

19 So, Your Honor, we would ask that all of
20 those witnesses be excluded. It is not just a matter of late
21 disclosure that the State finds something out late and then
22 discloses it as soon as they figure it out. We understand
23 they can't disclose what they don't have, and I think that
24 argument is irrelevant. Everybody understands that.

25 The point is when they do have it and

1 don't disclose it, what is the consequence? And we think the
2 consequence should be that they are precluded from offering
3 that testimony.

4 The same is true, Your Honor, with
5 respect to the experts. And we talked a little bit about the
6 late disclosure of Commander Mascher, who was disclosed as a
7 lay witness, along with Detective Kennedy back in June. No
8 tracking expert was disclosed to the defense at all until the
9 end of January.

10 We specifically litigated the issue of
11 police officers offering expert testimony, and the State
12 specifically said they didn't intend to offer expert
13 testimony. We may have resolved those issues earlier this
14 afternoon with respect to Detective Kennedy and Commander
15 Mascher.

16 I am not going to talk about Mr. Castle,
17 because my understanding is the State doesn't intend to call
18 him.

19 But the three very important newly
20 disclosed witnesses -- and I guess there is another one added
21 today, which I haven't had time to look at, but we will be
22 bringing to the Court's attention -- but with respect to the
23 ones I can talk about, Mr. Gilkerson is a new expert who was
24 disclosed to us on February 1st. He is identified as an FBI
25 examiner.

1 He was contacted by the State at least as
2 early as September of 2009, and not disclosed to us until
3 February. His report is dated in October of 2009. It was
4 not disclosed to us until February. We haven't received any
5 disclosure of his qualifications. And during the entire time
6 that we were litigating these issues, the State had this
7 information and did not disclose it to the defense.

8 Miss Costler, apparently, is no longer
9 going to be called as a witness, but they replaced her with
10 someone named Greg Cooper. This person is identified as a
11 criminal behaviorist. We have no 15.1 disclosure about
12 Mr. Cooper, and given your 404(b) rulings, we can't deny that
13 anything that he says can be relevant. But in any case,
14 disclosing this person three months before trial, when we
15 have absolutely no idea what they are going to testify to or
16 about, is simply unacceptable.

17 The same goes with Mr. Pitt -- or
18 Dr. Pitt. Again, disclosed to us on February 1st. The 15.1
19 disclosure with respect to Mr. Pitt includes the same kind of
20 designation that Your Honor already told the State would not
21 be acceptable. And that is all text messages, e-mails, and
22 notes, a summary of financial condition.

23 Again, these are meaningless. We have no
24 idea how to identify what documents you rely on, how to
25 prepare for an interview. The State hasn't identified what

1 he is going to rebut. And given the 404(b) exclusions that
2 Your Honor made, we can't imagine that he has anything
3 relevant or admissible to say.

4 So with respect to these late disclosed
5 experts, Your Honor, we think the sanction is appropriate,
6 and that sanction should be that the State cannot learn of
7 witnesses, identify them, and sit on them while the issues
8 are being litigated in front of the Court and then call them
9 as witnesses at trial.

10 I think the last category, Your Honor,
11 is -- the last category, Your Honor, is with respect to late
12 disclosed evidence. And we went through, in pretty
13 excruciating details -- and I apologize for that, but the
14 dates that we know the State received the evidence and the
15 date they were disclosed to us. Of specific significance, in
16 my opinion, Your Honor, is the crime scene diagrams that we
17 have been asking for for months and that weren't disclosed to
18 us until February.

19 But probably the most important is the
20 shoe report evidence. We have been litigating the issue of
21 the shoe reports, Your Honor. You will recall that Mr. Sears
22 drew a map of the shoe tracks and talked to Mr. Huante and
23 Detective Brown about the shoe reports. This was all done
24 while the State had shoe reports from the FBI and contact
25 with FBI people, who have now been put on the list as both

1 lay witnesses and expert witnesses -- without disclosing that
2 to us.

3 We have three months to go to trial, and
4 then we are provided suddenly with these reports and these
5 experts that the State's had during this time. It is
6 inexcusable to us and unexplainable, and they don't even
7 offer an explanation for why they've had it and didn't
8 provide it to us. But they shouldn't be permitted to use it.

9 Mr. DeMocker and the defense team has to
10 sort through the -- and I think Mr. Butner said now over
11 80,000 pages of disclosure. There are several hundred CDs of
12 interviews, not to mention the several thousands CDs of jail
13 calls -- and I guess sort through what all of that is
14 important, and at the same time, they deal with the late
15 disclosed issues that the State has been sitting on it. It
16 is simply not fair. It is not contemplated by the rule. It
17 is not contemplated by your order about disclosure, unless
18 required, and it shouldn't be permitted particularly in a
19 case where Mr. DeMocker is fighting for his life.

20 And the last thing I will say, and we
21 spoke about this a little bit earlier, was the information
22 that D.P.S. had about the CDs, DVDs, hard drives, and flash
23 drives, which they've now had for over 15 months. What you
24 heard was that Mr. Knapp's hard drive wasn't begun to be
25 examined until -- I think it was October.

1 Mr. Knapp committed suicide -- or
2 allegedly committed suicide in January. So his computer,
3 they didn't start examining it until ten months later.

4 Miss Kennedy was murdered in July. The
5 examination of her computers didn't begin until November. So
6 those items sat there for several months with nothing
7 happening to them, and they are still not complete.

8 We can't prepare for trial three months
9 away and have our experts do what they need to do without the
10 information that we have a right to examine from their
11 experts, with respect to the forensic evidence in this case.
12 We are expecting over five hard drives of reports of forensic
13 evidence. They don't even know when we are going to have
14 them. We don't have them now. We have three months to go,
15 and we have no anticipated deadline to receive them.

16 THE COURT: You have the actual hard drives,
17 but not the reports of their experts with regard --

18 MS. CHAPMAN: So we can do our independent
19 examination, but we can't evaluate the examination of their
20 experts. We are still not in a position to do that, and we
21 have a right to do that.

22 We are nine weeks from trial. So we have
23 nine weeks for them to finish it, for us to receive it, and
24 for our experts to independently evaluate and examine their
25 own examination. And there is simply not enough time.

1 And, Your Honor, given the repeated
2 violations, the repeated defiance of the orders, the fact
3 that we have been raising this issue since the beginning, we
4 think that the dismissal of the death penalty is, frankly, a
5 minimal step toward ameliorating the violations that were --
6 when we've just started scratching the surface of them today.
7 But dismissing the death penalty is a way to start addressing
8 the State's failure -- repeated failures -- to comply with
9 the rules and comply with the orders. And we'd ask Your
10 Honor to dismiss the death penalty and preclude the evidence
11 that was late disclosed.

12 THE COURT: Thank you.

13 Mr. Butner or Mr. Papoure.

14 MR. BUTNER: Judge, first of all, I think the
15 Court has heard the explanation concerning the D.P.S.
16 computer forensic reports. That is basically what it is.
17 They need to get them done, and they need to get them done as
18 quickly as possible.

19 The defense, of course, has not been
20 excluded from this evidence. They have had the same evidence
21 that the D.P.S. crime lab has been analyzing for this entire
22 time.

23 In regard to the crime scene diagrams,
24 they were promptly disclosed when they were finally prepared.
25 They were only prepared in the last -- I believe within the

1 last 30 days. And so, upon their receipt, they were
2 disclosed.

3 In regard to Richard Ach, Richard Ach is
4 a rebuttal witness, and out of abundance of caution, he was
5 listed as such, concerning the defendant's mitigation
6 evidence.

7 Brian Fagen. That is the FBI agent.

8 Gareth Richards, Mark Day, Jonathan
9 Lantz, and Eric Gilkerson, all pertain to the shoeprint
10 reports.

11 Investigation was undertaken by Detective
12 McDormett beginning in September. He had contacted the FBI
13 lab at Quantico --

14 THE COURT: September of?

15 MR. BUTNER: Of 2009, Judge. This past
16 September.

17 He had contacted the FBI lab in Quantico,
18 Virginia, trying to find out if there was any way that these
19 shoeprints, whose photographs had been deemed unacceptable
20 and constituted Willits evidence in this case, in fact, would
21 be good enough. The photographs were submitted. Ultimately,
22 Gilkerson said, well, maybe it might be these kinds of shoes.
23 That was no evidence whatsoever in this case. We didn't know
24 anybody that had anything to do with these shoes.

25 We then began analyzing the financial

1 records of the defendant, and lo and behold, it was
2 discovered that the defendant had purchased this type of
3 La Sportiva shoe in -- I believe in -- I can't remember the
4 month -- it's in 2006. April of 2006.

5 At that point in time, it was then
6 ascertained that, in fact, that kind of shoe would match that
7 kind of print, with those bad photographs from the area
8 behind the Bridle Path residence. And that was found out on
9 January 28 of 2010. It was disclosed on January 29 of 2010.

10 And those people that were involved with
11 that, Gareth Richards being the guy that owned the business
12 that sold the shoes to Mr. DeMocker, Mark Day and Jonathan
13 Lantz as part of the company that makes that kind of La
14 Sportiva shoe sole, Eric Gilkerson being the FBI expert, and
15 then Brian Fagen is a special agent, I believe he is in
16 Flagstaff, and the contacts went through Brian Fagen.

17 So in terms of withholding evidence, that
18 is just not true. That evidence was disclosed as quickly as
19 we got it.

20 In terms of the back country search team,
21 Supplement 6, which apparently was overlooked by the defense
22 as well as the State, at Bates No. 628 referenced the back
23 country search team in a rather oblique paragraph, making
24 reference to the fact that they had searched out back, so to
25 speak, behind Bridle Path. That is when they were noticed.

1 THE COURT: What are they important to testify
2 about?

3 MR. BUTNER: Just that a more thorough search
4 was conducted than the defense has led the Court to believe,
5 and that a piece of rebar was found out there, and no other
6 footprints of any significance and no other evidence of any
7 significance were found.

8 THE COURT: Rebar tie into anything in the
9 case?

10 MR. BUTNER: No. It doesn't tie into
11 anything.

12 Recently disclosed witnesses. Debbie
13 Hill, Paula Matthews, Dr. Rubin, Deane Shank, Marjorie
14 Powell, and Brandon Stafford. Well, first of all, Marjorie
15 Powell was noticed as a witness for quite some time, and she
16 is one of the horseback ladies -- Lila Farr and Marjorie
17 Powell -- as the ladies that Carol Kennedy encountered on her
18 run. So she has been noticed for quite some time.

19 Paula Matthews, she is a rebuttal witness
20 in this case for the defendant's mitigation.

21 Dr. Rubin, rebuttal witness in the event
22 that the defendant takes the stand and does not tell the
23 truth about certain items of evidence.

24 Deane Shank, he was referenced earlier.

25 And Brandon Stafford. Debbie Hill -- she

1 is also a rebuttal witness. These are people that were not
2 likely to be called.

3 THE COURT: Their purported testimony or some
4 summary of it, has that been provided to the defense?

5 MR. BUTNER: It has in the disclosures, in the
6 police reports, and so forth.

7 Dr. Rubin. We don't know what Dr. Rubin
8 has to say. The defendant asserted the privilege. He was
9 the defendant's counselor. Presumably, the defendant would
10 know what Dr. Rubin has to say better than the State does, at
11 this point.

12 The one thing that Dr. Rubin does know,
13 according to the defendant, is whether the defendant prepared
14 a chart that said "Barb, Carol, Barb, Carol, Barb, Carol," at
15 the instruction of Dr. Rubin. And that was found in the
16 defendant's items that were seized pursuant to a search
17 warrant.

18 In terms of forensic testing on the 14
19 items, this has been specified to the defense at every step
20 along the way. The checkbook cover and No. 518, the receipt
21 found in the trash can, they were analyzed. We have not
22 received the formal report. We indicated that orally. There
23 was nothing of significance found on those items. That is,
24 all results were negative. Any further testing will be
25 disclosed in compliance with the Court's order.

1 In terms of jail calls. Supplement
2 No. 126, which has been disclosed, was disclosed on the
3 January 29th disclosure. Basically, describes the dates and
4 times of all of the phone calls that the State is going to
5 use in this case. And it is about a -- well, Bates No. 17805
6 through 171813.

7 DNA. There is no paperwork generated for
8 CODIS searches. However, if there is a hit, then paperwork
9 is generated. There haven't been any hits, so there hasn't
10 been any paperwork generated.

11 They are in possession of the one item of
12 paperwork -- the submission, as described by counsel.
13 They've had that for a long time. A search is done at least
14 once a month on an automatic basis. And this information has
15 been provided previously by Kortney Snider from the D.P.S.
16 lab.

17 In terms of the fingerprint analysis, you
18 know, counsel got us with that one. We contacted the lab
19 after that request. They told us that there weren't any
20 usable prints. Lo and behold, counsel in this motion to
21 preclude, brings to our attention two reports from back in
22 July of 2008, that there was some ridge detail.

23 And if you read the report, it says:
24 "The ridge detail was compared to the submitted prints, and
25 no identifications were made." It's talking about Item

1 No. 803. And in the same -- on the same -- no, on a
2 different date, but referred to by counsel, indicates that
3 that particular latent print is retained in the unsolved
4 latent database for the on-going automated search, similar to
5 the DNA. And that is in the AZ Aphis department. And that
6 is referenced by counsel -- those reports, August 27, 2008,
7 Evidence Item No. 803.

8 And, also, then, a report, August 21st,
9 2008, Evidence Item No. 852, both searched.

10 Now, in regard to Dr. Steven Pitt, he was
11 described to be a rebuttal witness concerning defense
12 mitigation at the outset, as soon as he was disclosed.

13 Richard Echols.

14 THE COURT: So what is Pitt purportedly going
15 to talk about?

16 MR. BUTNER: He is a psychiatrist, Judge. I
17 think that he will talk about, basically, a lot of things
18 that have not been ruled to be relevant in this case, and
19 that is the defendant's character and reputation for truth
20 and dishonesty, his business practices, his practices in
21 regard to fidelity or infidelity in his marriage. All of
22 those kinds of things. It's anticipated that the defense
23 will present a lot of evidence about that kind of thing, and
24 I think that Dr. Pitt will be in a position to rebut a lot of
25 it.

1 In regard to Susan Costler, the State
2 identified an expert as a criminal behavior analyst. That
3 was Susan Costler. It was then determined that she would not
4 be able to do that by the rules of the FBI.

5 The State then found Gregory Cooper, who
6 had been substituted, due to her unavailability, so to speak.
7 And he will testify about facts present at the crime scene
8 and analyze the criminal behavior at the crime scene, that
9 type of thing. Expert testimony. He is qualified to do so,
10 and has been an instructor in that area for many years, and
11 is also a former FBI analyst in that regard.

12 THE COURT: Are you talking about the penalty
13 phase?

14 MR. BUTNER: No, I'm talking about case in
15 chief, Your Honor.

16 THE COURT: Case in chief?

17 MR. BUTNER: Yes.

18 In terms of Ron Castle, he has been
19 withdrawn.

20 If I could have just have a moment, Your
21 Honor.

22 THE COURT: Yes.

23 (Whereupon, a discussion was held off the record.)

24 MR. BUTNER: Mr. Echols' information was
25 disclosed in the 45th disclosure supplement. For some

1 reason, apparently, the Bates numbers were omitted. We even
2 have them in the computer. We can give them to counsel now.
3 I don't know how that happened, Judge, quite frankly.

4 But that analysis of all of his documents
5 has been conducted and Bates numbers have been assigned and
6 should have been attached to the, what, 46th disclosure
7 supplement. January 29. And that was provided to the
8 defense on January 29.

9 In regard to the James Knapp cell phone
10 information, that information is actually summarized in a
11 report Supplement No. 118, which counsel complains about, was
12 provided in the January 29th supplement to the defense. But
13 that is merely a summary of the information that was provided
14 in the 44th supplement, dated January 7th of 2010, identified
15 specifically as cell tower location and distances, Bates No.
16 16449 through 16454.

17 In terms of the D.P.S. disclosure, we
18 have notified the defense D.P.S. doesn't have any corrective
19 action logs. We have provided the STR frequency tables, at
20 least where they have been published. We have provided every
21 bit of information we could possibly get out of the D.P.S.
22 crime lab concerning DNA.

23 We've disclosed information to the
24 defense from the D.P.S. crime lab concerning DNA or
25 laboratory analysis beginning in January of 2009. And going

1 on a very regular basis, January 2009, March 3rd of 2009,
2 April 27th of 2009, May 4th of 2009, May 28th of 2009,
3 June 19th of 2009, July 15th of 2009, November 24th of 2009,
4 December 10th of 2009, December 23rd of 2009, January 22nd of
5 2010, and January 29th of 2010. Hundreds, if not thousands
6 of pages, Judge, of disclosure from the D.P.S. lab.

7 This has been portrayed to the Court as
8 some sort of an on-going foot-dragging by the State in this
9 case. There is nothing farther from the truth in that. The
10 disclosure in this case has been voluminous.

11 It has been an on-going project for one
12 and then ultimately two paralegals working on it, in addition
13 to myself. You know, some things have gotten omitted.
14 That's happened inadvertently. We have never left anything
15 out intentionally. And for them to act as if that is the
16 case is simply not true.

17 I guess the thing that I want to focus
18 on, most importantly, and I know that the defense focused on
19 this, too, is the footprint evidence. This is extremely
20 important evidence, Judge, that was very recently discovered.
21 And for them to act as if we were withholding evidence is
22 absolutely untrue.

23 We had no evidence until we found shoes
24 that matched those footprints. And ultimately, of course, we
25 disclosed those as promptly as possible. And I would ask

1 that the defense motion be denied in its entirety.

2 MS. CHAPMAN: Your Honor.

3 THE COURT: Miss Chapman.

4 MS. CHAPMAN: I can't overstate the level of
5 frustration on the defense side with respect to the way that
6 this disclosure has been treated and the way that this
7 response has been stated, both in the detail -- level of
8 detail and in the incorrect way that it is portrayed and in
9 the way that the detail is wrong.

10 With respect to -- and I'm not going to
11 go through every point, but I am going to focus on some of
12 the big ones. With respect to the diagrams that Mr. Butner
13 said were created recently, I cited to Your Honor in the
14 motion the date it was created, it was July of 2008, and it
15 was produced to us in January. So I don't know how the State
16 comes and says it was produced right when it was created.
17 Those things don't make sense to me. I can't reconcile it.

18 The same thing with respect to the shoe
19 and the shoe report. What Mr. Butner has just said is, well,
20 we didn't have inculpatory evidence until January when we
21 produced it, but they had Brady evidence in April and October
22 when they had a report from the FBI that said we think this
23 print matches this shoe. And why they didn't disclose that
24 until they could tie it to Mr. DeMocker and call it
25 inculpatory information is a whole other question.

1 But to call it not evidence or
2 information until they could tie it to Mr. DeMocker is
3 disingenuous and frankly outrageous. It was Brady
4 information at the time they had the report in October, and
5 they didn't give it to us until the end of January, and they
6 knew we were litigating this precise issue in front of this
7 Court.

8 And they don't have the shoe in question
9 now. They didn't have it then. So the only thing that
10 changed is that they think that they have a piece of evidence
11 that they can use as opposed to a piece of evidence that may
12 be evidence of someone else at the crime. That is what they
13 had in October, that is what they should have provided to us
14 when they got it, starting in April. And that is what all of
15 those other contacts that relate to the shoe report arise
16 from.

17 That is why it is simply unacceptable for
18 them to sit on it while we are litigating the issue of the
19 shoeprints in your courtroom. To call it not evidence until
20 they can do something with it or think they have something to
21 do with it is unacceptable. It makes no sense.

22 With respect to the back county search
23 team, Your Honor, it is true that we have a reference on
24 Page 628 to a back country search team. We didn't have any
25 witnesses identified from that list until January of 2010.

1 That is why those witnesses should be excluded.

2 I am not sure if they are relevant, and
3 if Your Honor wants to exclude them on that basis, that is
4 another question. But the point is they are not identified
5 to us until January on a list of over 140 other witnesses.

6 With respect to -- and this is where we
7 talk about the detail. You know, Mr. Butner says, well,
8 Mr. Rubin was disclosed, and Miss Matthews was disclosed.
9 Yes. I pointed out in the motion they were disclosed, and
10 then they were withdrawn. That is the point. They were
11 withdrawn and then now put back on the list.

12 And Your Honor had asked them to narrow
13 the list and identify who they would and wouldn't be calling
14 so that we could start to prepare for trial, which is now
15 three months -- about ten weeks away. And to take them back
16 on and put them back off is not to comply with that order and
17 it is to put us in a position where we can't prepare for
18 trial.

19 We made decisions, defense team
20 decisions, about resources to contact and not contact
21 witnesses on the basis of that representation. Those
22 witnesses live out of town. We were in those places and made
23 decisions to not contact those witnesses on the basis of what
24 Mr. Butner provided to us and what was attached to the
25 motion.

1 With respect to the forensic testing,
2 Your Honor, Mr. Butner still doesn't answer the question. He
3 says, well, they are being analyzed. Well, that's great. We
4 would like to know what they are being analyzed for, and that
5 is what Your Honor ordered the State to provide to the
6 defense and what even today they have failed to provide to
7 us. It makes no sense to tell us they are being tested.
8 What are they being tested for? We still don't know.

9 With respect to the jail calls, it would
10 have been very helpful for the State to provide, in their
11 disclosure, the identification of what Supplement 126 was.
12 Yes, it lists jail calls. We also got summaries of over a
13 thousand other jail calls in other places. There was no
14 identification anywhere that these were the calls that the
15 State intended to rely on. So I don't know how we were
16 supposed to divine that from what they provided to us, but we
17 couldn't do it.

18 With respect to the DNA, Your Honor,
19 Mr. Butner says, again, well, there is no paperwork. But
20 reading from their reply, there is paperwork generated when
21 the profile is submitted. I would like that paperwork. I
22 have been asking for that paperwork for months. Your Honor
23 has ordered the State to provide that paperwork to the
24 defense, and they still failed to do it. And in fact, when
25 they respond, they purport as if there is no paperwork.

1 It doesn't -- this is what is so
2 frustrating to us. We ask for something, they tell us they
3 don't have it. You order them to provide it, they say they
4 don't have it. Then they say, well, maybe we do have it.
5 Then they say we don't have it, or we already gave it to you,
6 but we just didn't tell you what it was.

7 There is no way for us to meaningfully
8 prepare what we need to prepare, to be ready to do in ten
9 weeks in this court with that kind of treatment of this
10 volume of material. It is simply not possible.

11 With respect to the fingerprints, Your
12 Honor, again, we still don't have the answer. Two
13 fingerprints were found of value at the scene of the crime.
14 They were tested once each in August of 2008, only within the
15 Arizona system. The State has still not confirmed that they
16 have never been tested anywhere else in any other system any
17 other time.

18 That is what Your Honor asked them to do.
19 That is what I've asked them to do here today. I don't think
20 it is a difficult or complicated question. It still has not
21 been answered.

22 With respect to Dr. Pitt. It is
23 irrelevant that he is a rebuttal expert. The point is the
24 State has not made the required disclosure with respect to
25 15.1 about what he will rely on to allow us to prepare for

1 trial.

2 In addition to that, as Mr. Butner said,
3 you have already excluded much of what Dr. Pitt may be
4 permitted to testify about. Your Honor, in the reply I
5 listed about 25 witnesses about which we don't have
6 disclosure or about which the disclosure we do have seems to
7 be related only to evidence items that Your Honor has
8 excluded in the 404(b) designation. And we have asked that
9 the State make a proffer with respect to those witnesses,
10 because it is precisely the kind of stuff -- business
11 practices and fidelity -- that either the State said they
12 weren't going to offer or Your Honor said was not going to be
13 admissible.

14 And we would like the State to do that,
15 because there is at least 25 witnesses, that I can count,
16 having gone through the disclosure, that we either don't know
17 what they are going to say, because there is no disclosure,
18 or what they are going to say is inadmissible or not
19 relevant.

20 And the same thing applies to Mr. Cooper,
21 who was disclosed to us, I believe today, or maybe yesterday,
22 again, late disclosed. There is no reason to think he has
23 anything admissible to say. He is a criminal behaviorist.
24 And we don't have any disclosure about what he relied on,
25 which Your Honor required them to produce by the 29th.

1 Again, we have ten weeks to go. We can't
2 prepare to examine these witnesses. We can't prepare and
3 identify our own experts to respond to them. We can't
4 prepare for trial with this kind of disclosure and practice
5 by the State.

6 With respect to Mr. Echols, I don't know
7 what to say. The Bates numbers were omitted. We never got
8 them. It was clear from our response that we never got them.
9 We still don't have them. Your Honor asked them to provide
10 them by the 29th and again by the 12th. I don't have it.
11 That is the bottom line. I don't have it today, and it has
12 never been provided to me.

13 And I guess with respect to the D.P.S.,
14 you know, we -- Mr. Butner gives you a list of dates. And
15 what is so great about that is it is absolutely true. Yes,
16 we have thousands of pages of D.P.S. reports. It is the last
17 date he mentions that is so important, because that is the
18 date they gave us what we asked for, which was the protocols
19 to allow us to evaluate the thousands of reports they had
20 given us up to that date.

21 And, you know, with respect to the STR
22 tables, they told us where they are published without giving
23 us the tables. You ordered them to give us the tables. We
24 would like the tables. We still don't have them. We can't
25 evaluate the reports without the tables.

1 There is no reason for the State to get
2 away with, frankly, the glib way they've responded to the
3 motion, the way they've produced the disclosure. I
4 appreciate the good work that their paralegals are doing, and
5 I know there is a lot of disclosure here.

6 But we are talking about a death penalty
7 case. We are talking about a volume of disclosure and
8 evidence that has to be sorted through. And we are talking
9 about orders of the Court and rules of the Arizona Supreme
10 Court that require the State to do certain things that they
11 have not done on a repeated and continual and present basis.

12 And, Your Honor, I think dismissing the
13 death penalty is a good first step, frankly, to addressing
14 the repeated failures and continued failures of disclosure in
15 this case.

16 THE COURT: Thank you. I will take the matter
17 under advisement.

18 It is a quarter to 5:00. What else do
19 you think we need to cover today, other than setting what our
20 next hearing is and what we are going to talk about at that
21 hearing?

22 MR. SEARS: Judge, I have a few things I would
23 like to talk about on the jury selection issue. And one of
24 the reasons that I keep trying to bring this to the front of
25 the bus is that Mr. Guastaferro, who you met, who works with

1 us, tells us that the sooner he can get started on creating
2 his database in this case, the more likely we are to be able
3 to meaningfully process and interpret the questionnaires as
4 they come in, in this case.

5 I have the draft that you circulated that
6 you marked up of the questionnaire, and I have a couple of
7 comments about a few of the questions that we still would
8 like to visit with you, if you have that available to look
9 at.

10 And then I would like to talk about
11 putting back in one particular question that you had taken
12 out in your markup. And then finally talk about trying to
13 pin down the time period, so we can get everybody that needs
14 to be involved in the logistics, like the jury commissioner
15 and the various people, ready to go.

16 MR. BUTNER: Judge -- I was going to say I
17 don't know if I have this with me, but I do.

18 THE COURT: I am with you.

19 MR. SEARS: Okay. Looking first at
20 question -- it was our Question 87, which I think turns out
21 to be 86 in your markup. And I just realized, looking at
22 what I printed out, that I somehow managed to cut off the
23 questions. But it's -- your markup begins "When deliberating
24 in the sentencing phase of this trial, each juror is allowed
25 by the law to consider factors, even if not mentioned by the

1 lawyers -- even if not argued by the lawyers, but mentioned
2 in the instructions from the Court, if supported by the
3 evidence."

4 The one observation we have is that
5 phrase "supported by the evidence." I think the
6 jurisprudence in this area, Your Honor, that that provided
7 the Court about which we know, says that jurors can use any
8 reason to grant mercy and are not required or obligated to
9 articulate or justify it. They can simply decide from their
10 own hearts and minds to administer mercy in the case.

11 So I think it's probably -- our request
12 would be to leave the language we have, which is "even if not
13 mentioned by the lawyers and the instruction of the Court."
14 I do think that is an accurate statement of the law. I don't
15 think there is a requirement that requires those factors to
16 be supported by the evidence.

17 MR. BUTNER: Judge, believe it or not, I agree
18 with Mr. Sears on that. I don't think there is any
19 requirement of any of that being supported by the evidence,
20 as strange as that may sound.

21 MR. SEARS: May I call home, Your Honor, and
22 report this development?

23 THE COURT: No. I will strike the language,
24 then.

25 MR. SEARS: Thank you, Your Honor. So I think

1 we go back to our version of the question, which was our 87.

2 All the way going back to Question 7,
3 which is -- in our Question 7, we had used the phrase "sick
4 or elderly," and you had left in this original version of
5 "infirm person." I guess, technically, I don't know --
6 Mr. Guastaferrero suggested changing that to "infirm person."
7 I am not sure that I understand his comment. So I don't
8 think that is important.

9 The one I do want to talk about is our
10 Question 17 on race and ethnicity. We have seen a new
11 opinion from the 9th Circuit, that has just come down,
12 U.S. versus Guerrero. It is a 9th Circuit panel decision,
13 but it is the dissent of the case --

14 THE COURT: Do you have that cite?

15 MR. SEARS: It is 09-30066. It was decided
16 yesterday. And it is Judge Tolman. It is Judge Gould's
17 dissent that interests us.

18 This was a case in which the defense
19 raised a Batson strike on a prospective juror.

20 Defense counsel thought that the juror
21 appeared either Native American or Hispanic. The U.S.
22 Attorney and the judge both said they didn't see that, just
23 looking at the juror, and denied the -- the judge denied the
24 Batson challenge.

25 They went back and looked at the

1 questionnaire, and the judge said, you know, this person
2 seemed to say something about having a connection to Hawaii.
3 Maybe they're Hawaiian. And the Court asked the U.S.
4 Attorney, who said not that I see, and hadn't paid attention
5 to her background, and the Court thought that was a
6 sufficient race neutral explanation to deny the Batson
7 challenge.

8 The problem is self-identification. And
9 I thought, we all thought, looking back at the transcripts of
10 our conversations about this, that you were struggling, Your
11 Honor, with the question about the ethnicity of the
12 prospective jurors' spouse. And we agree that that is
13 probably going a bit far. But we do think it's important,
14 and this case reminds us of why it might be important to ask
15 people to self-report their own ethnicity, when it wouldn't
16 be apparent from the other answers in their questionnaire,
17 their physical appearance or demeanor or their name.

18 And so I don't think it is an offensive
19 question. As I think I pointed out in some of our
20 discussions, we were all asked questions about our ethnic
21 background in lots of context. And if it was just limited to
22 the person filling out the questionnaire's ethnicity, I think
23 we could avoid the potential Batson pitfall that we see in
24 the 9th Circuit case.

25 So I would ask the Court to consider

1 putting back in -- I think it was Question 17 that we have,
2 as modified, to limit the question only to the ethnicity of
3 the prospective juror.

4 MR. BUTNER: The State will continue to
5 object, Judge, that this is an improper area of inquiry
6 concerning people's race and color, and we don't think that
7 that is appropriate. I think that the jurors will find it
8 offensive, too, quite frankly.

9 THE COURT: I will take a look. I'm still
10 leaning toward leaving it out, but I will take a look at
11 Guerrero and see --

12 MR. SEARS: Thank you, Your Honor. It's
13 Judge Gould's dissent that raises that issue.

14 THE COURT: I made a note.

15 MR. SEARS: Thank you.

16 I am looking at our 85, which became your
17 84. We had said, in what I thought was a pretty direct -- we
18 were looking for attitudinal answers from prospective jurors
19 about whether they would ignore mitigation evidence about
20 background or circumstances of the crime.

21 We think that your change, which comes
22 out in your Question 84 in your markup, Your Honor, is a
23 little less clear about what it is that the question is
24 getting at, because it uses some qualifiers like "may be
25 considered."

1 We are looking for just a direct
2 attitudinal question. Our experience is that some jurors
3 will say, during voir dire, that they will sit politely
4 during the mitigation phase, but there is nothing you can
5 tell them about a person's background or the circumstances of
6 the crime that they will take into consideration in deciding
7 death versus life. That is why we tried to ask the question
8 in that direct manner.

9 We think that your version of that
10 undercuts in a way what we were trying to get at, which is do
11 they have this set-in-stone attitude of ignoring mitigation.
12 But it's the way it is phrased, that it may be considered by
13 the jury. If a person -- even if a person disagrees with
14 that, I think the question is written in such a way that it
15 would not be clear, necessarily, from that answer, what they
16 were trying to communicate about their willingness or
17 unwillingness to consider mitigation. So I would ask you to
18 consider resuscitating our 85 in place of your 84, Your
19 Honor.

20 I think the only other suggestion we had
21 was the proposed admonition that the jury committee has come
22 up with that I think is a more updated version. I think the
23 Court indicated it was familiar with the admonition that
24 talks about Twitter and Facebook and Myspace and things like
25 that. And I think that could be incorporated both in maybe

1 the questionnaire itself and also in the videotape that we
2 would propose to draft.

3 MR. BUTNER: Are we off of Question 84, now?

4 THE COURT: He is, but you are not.

5 MR. SEARS: I'm sorry. I guess I was just
6 accustomed to Mr. Butner just agreeing with it.

7 MR. BUTNER: You got awfully used to it
8 awfully quickly.

9 MR. SEARS: Get over it? Is that what you are
10 saying?

11 MR. BUTNER: That might be a good idea.

12 Judge, I disagree, of course, with
13 Mr. Sears on this particular point. I would think the
14 Court's suggested question is much better. Much more
15 appropriate.

16 THE COURT: With regard to -- I am going to
17 stick with the one that I had, but it doesn't mean that you
18 can't follow-up, obviously, when we get to the other voir
19 dire, in the individual circumstances.

20 So I am going to deny your request to
21 remodify or change back 84 to your 85. But I don't think I
22 am familiar with -- or I don't recall having said that I was
23 familiar with the ABA instruction that you were talking
24 about.

25 MR. SEARS: Maybe we can get Phil to make a

1 copy.

2 THE COURT: It says attached, and I didn't see
3 it attached. So I'll have Phil make a copy and return this
4 to you.

5 Do you have a copy, Mr. Butner?

6 MR. BUTNER: No.

7 MS. CHAPMAN: Your Honor, just for
8 clarification, it's the Arizona Jury Instruction Committee,
9 Arizona Bar Jury Instruction Committee.

10 THE COURT: Not the ABA?

11 MS. CHAPMAN: Right.

12 THE COURT: Not the American -- after I look
13 at it, maybe I will refresh my recollection of which one it
14 was, because I didn't look at it when you just gave it to
15 Phil.

16 MR. SEARS: We also think, in the first
17 paragraph of the -- Your Honor, I think the way in which we
18 are looking at this admonition, this admonition, obviously,
19 is intending to update the admonition given to jurors during
20 the actual in-court jury selection process. But I think as
21 we said on more than one occasion thus far in this case, that
22 once the jurors are brought in for the questionnaire process,
23 we want them to be admonished, as the Court has already
24 suggested --

25 THE COURT: Absolutely.

1 MR. SEARS: -- pretty specifically. And we
2 may be able to come up with a version of this that can
3 actually go into the questionnaire and into your videotape
4 preamble to try and drive the point home. That is the moment
5 at which this admonition attaches.

6 THE COURT: Do I have anything scheduled, for
7 the time being, other than March 2nd?

8 MR. SEARS: No, Your Honor.

9 THE COURT: And you wanted some decisions made
10 on this before March 2nd?

11 MR. SEARS: If we could, Your Honor.

12 THE COURT: We are rapidly approaching that
13 since Monday is the 22nd of February. And March 2nd is the
14 Tuesday beyond that.

15 I don't know if we are going to be able
16 to get to that.

17 Do you have something that you want to
18 get to me that both sides are agreeable to the kind of
19 admonition that I can videotape?

20 MR. SEARS: Here is what I would propose, in
21 the next 90 seconds here, we take up. Would be to pick a
22 date by which the Court would have adopted a version of the
23 questionnaire that we know we are going to go with. Say now
24 that the dates that we proposed in April for bringing the
25 jurors in, that week in April to bring the jurors in, if you

1 want to go Monday, Tuesday, Thursday, Friday, now, with
2 sessions then, and skip Wednesday to minimize the conflict
3 with possible jurors that are being called to the other
4 divisions in the Verde or here, that would be okay.
5 Arbitrarily pick a date sometime after that, around your
6 schedule, for a meeting with counsel to look at
7 questionnaire-based strikes --

8 THE COURT: I have been holding the afternoon
9 of Tuesday, April 13th, for that purpose.

10 MR. SEARS: Yahoo. And I think that's -- if
11 we can get those things done. And the dates we had picked in
12 April would have been the Monday, Tuesday, Thursday, Friday
13 of the week before April 13th.

14 MS. CHAPMAN: April 5th through 9th.

15 THE COURT: Right.

16 MR. SEARS: So if we could all agree that that
17 would happen.

18 And then if you want to give us, before
19 we come to court on March 2nd, we would have -- I think we
20 can do a rough draft of a script for the video. I don't know
21 what kind of length you are thinking of. I've never timed
22 Chief Justice Burgess' video. I don't know whether it's 30
23 minutes or 40 minutes. I am thinking it's more like 30.

24 THE COURT: I don't think it is that long.

25 MR. SEARS: I think I could go a bit more

1 quickly. I was thinking of somewhere like three to five
2 minutes.

3 THE COURT: Right. I don't see anything
4 necessary longer than that.

5 So what I will do is continue to hold the
6 afternoon of April 13th, in terms of before -- excuse me.
7 The 5th, 6th of April, 8th, 9th, that sounds doable. I will
8 check with Margaret about whether we have a Tuesday jury
9 selection that week by anybody. That's the only probable fly
10 in that ointment.

11 MR. SEARS: Skip Wednesday altogether?

12 THE COURT: Probably. But that also depends
13 on what else -- I know I have a Wednesday trial that week.
14 Like most Wednesdays. I have like four Wednesday trials that
15 week.

16 MR. SEARS: I am thinking she is probably
17 going to want to send out the questionnaires, based on what
18 she told us when she came and visited, probably two to three
19 weeks before April 5th.

20 THE COURT: Not the questionnaire, but the
21 request for the jurors to appear.

22 MR. SEARS: Yes. The request for them to
23 appear would have to go out, so she would have to do the
24 selection process at that point, and the questionnaires would
25 all have to be prepared and copied and available for each of

1 those days.

2 And then we would have to work out with
3 her, which I think we could do without bothering you, the
4 logistics of how we can go and pick them up, and copies can
5 be made every day and disseminated to counsel.

6 THE COURT: I still have some issues with the
7 clerk's office on who is going to do that.

8 MR. SEARS: We can do it. We hereby
9 volunteer.

10 THE COURT: They would probably appreciate
11 that.

12 Anything on those issues that you wanted
13 to --

14 MR. BUTNER: Judge, what is Tuesday, April the
15 13th being held open for?

16 THE COURT: For you and for Mr. Papoure,
17 Mr. Sears, and whoever else from this side chooses to discuss
18 anyone that should be stricken from being called in, just
19 based on what they've already answered, primarily dealing,
20 presumably, with pretrial publicity or simple unavailability.

21 MR. BUTNER: I have two trials scheduled on
22 April 13th.

23 THE COURT: In front of Judge Hess?

24 MR. BUTNER: Probably Judge Darrow. But in
25 looking at them, one of them looks like it will be going

1 away. The other one doesn't look so good.

2 THE COURT: Do what you can. I will take
3 Mr. Papoure.

4 MR. PAPOURE: I can be available.

5 MR. SEARS: As soon as somebody tells him what
6 we are talking about.

7 MR. BUTNER: He is a fast learner.

8 MR. SEARS: What we had anticipated was, then,
9 using the period of time beginning on the 5th and then
10 through the weekend and the first couple of days to
11 communicate with the State to see if we can come up with
12 stipulated strikes off the questionnaires, based on whatever
13 the State is comfortable with. As we said before, the State
14 would be surprised about how many we ought to be able to
15 agree on.

16 THE COURT: Okay. Our next session is March
17 2nd, I think, and I forget what the time is on that.
18 Probably faster to get the book.

19 MR. SEARS: Was that a day that we also have
20 the afternoon?

21 THE COURT: I think so, but I am not positive,
22 so I would like to look before I leap, because the detention
23 folks would have to recall that.

24 MR. SEARS: We certainly have DNA to talk
25 about. I think the omnibus death penalty motion could be

1 heard that same day.

2 THE COURT: Yeah.

3 MR. SEARS: And in our reply on the motion to
4 preclude and strike the death penalty, we have listed by name
5 the 25 witnesses, plus Mr. Ach and Mr. Rubin, that we would
6 ask the State to make some sort of a proffer to you about, so
7 that we know, going forward, whatever witnesses are likely be
8 allowed to testify. Maybe the State can be prepared to do
9 that on the 2nd.

10 MR. BUTNER: We can do that.

11 THE COURT: I'll plan on that.

12 THE BAILIFF: Nine to noon, Your Honor.

13 THE COURT: Thank you. Nine o'clock is March
14 2nd.

15 The remaining motions I will try to take
16 up at that point, then.

17 MR. BUTNER: Judge, we got this 53-page
18 omnibus motion filed by the defense. The State would request
19 a little bit of additional time to respond to this lengthy
20 tome, if at all possible.

21 MR. SEARS: How much time for the tome does
22 the State --

23 THE COURT: If we are going to discuss that on
24 March 2nd, we are going to need some response before then.

25 MR. BUTNER: Yeah. I can't do the math in my

1 head, but it strikes that it is already too soon.

2 MS. CHAPMAN: You get ten days.

3 THE COURT: Today is the 19th, and there are
4 28 days in February. I don't think I can give you that,
5 Mr. Butner. I'll just appreciate your response when you can
6 get it to me, and I think the 2nd is ten days from now,
7 effectively.

8 So I am not going have enough time for a
9 reply if we argue it on the 2nd.

10 MR. BUTNER: I understand. And this is
11 March 2nd, 9:00 a.m.?

12 THE COURT: Right.

13 MS. CHAPMAN: So it is going to be filed on
14 that day? Just to be clear.

15 I mean, the rule is ten days from the day
16 it was filed. I don't remember if it was filed a couple of
17 days ago, and I don't mind not doing the reply, but --

18 MR. BUTNER: Served.

19 MS. CHAPMAN: Well, it was served that day,
20 the day it was filed.

21 MR. BUTNER: That is a Tuesday?

22 THE COURT: It is. I may be able to afford
23 you some time later that week. I don't know right now.

24 I have a trial that commences, but they
25 are still trying to negotiate their way into a settlement.

1 And I simply don't know at this point if they are going to
2 get it settled or not. It's one with Mr. Gil Shaw, and I
3 forget who the prosecution is.

4 MR. PAPOURE: Eric English? Is that the
5 Eastwood case?

6 THE COURT: Yes. Exactly.

7 MR. PAPOURE: I don't think that's going to
8 go.

9 MR. BUTNER: Let's try to set it a little
10 later in the week, then.

11 THE COURT: I will leave it where it is for
12 the time being. If that goes away and I can do something
13 else with that time, I will move it to later in the week.

14 MR. PAPOURE: There is a pretty good
15 likelihood that is not going to go, Judge.

16 THE COURT: I am supposed to have a final
17 pretrial conference, I think, next week on that.

18 MR. PAPOURE: I think we will have a decision
19 by then, Your Honor.

20 MR. SEARS: I may have not heard all of the
21 interchange between the Court and Mr. Butner about this, but
22 the omnibus motion was filed on the 16th. If there is ten
23 days, by my calculation, that would make the response due on
24 or before the 26th of February.

25 THE COURT: If it was filed and served on the

1 same day, that would be --

2 MR. BUTNER: Then again, too, it exceeds the
3 page limit by about double.

4 MR. SEARS: We filed a motion.

5 THE COURT: You filed a motion. I haven't
6 signed it yet.

7 MR. BUTNER: So I'm asking for a little
8 consideration in that regard.

9 MR. SEARS: I think we have a little
10 flexibility between -- that if the State took -- if it was
11 due on the 26th and the State took -- sorry, I don't have the
12 calendar in front of me.

13 THE COURT: 28th is Sunday. March 1st is
14 Monday.

15 MR. SEARS: If the State could file it Monday,
16 March 1st, I would at least have it in hand before we came
17 into court on the 2nd.

18 THE COURT: I will keep you all posted. If we
19 can move it back later in the same week, I will do that for
20 everybody.

21 MR. SEARS: That would give the State a few
22 extra days.

23 THE COURT: Maybe you will have time to
24 formulate some kind of a reply.

25 So I will authorize by March 1st.

1 MR. BUTNER: Thank you.

2 THE COURT: Assuming Mr. Sears is correct
3 about when it was filed and served.

4 So right now, March 2nd is the only
5 hearing I have next, at nine o'clock for Mr. DeMocker to be
6 present at. And if I can allocate some additional time later
7 in the week, I will do that.

8 MS. CHAPMAN: Were there particular days Your
9 Honor was looking at that you might allocate, or you are just
10 not sure what the days would be later in week?

11 THE COURT: It would be Wednesday, Thursday,
12 or Friday. I am not sure at this point which. We will try
13 and touch base with your offices, maybe via Mr. Sears or
14 maybe directly. I will try to see what date would be better
15 for you than another. Also, if Mr. Butner is scheduled.

16 MR. BUTNER: Thanks, Judge.

17 THE COURT: Are you in trial on the week of
18 March 1st?

19 MR. BUTNER: No. I am not in trial on that
20 week. I have one that starts the 17th.

21 THE COURT: I have four. Who is counting?

22 (Whereupon, these proceedings were concluded.)

23 ***oOo***

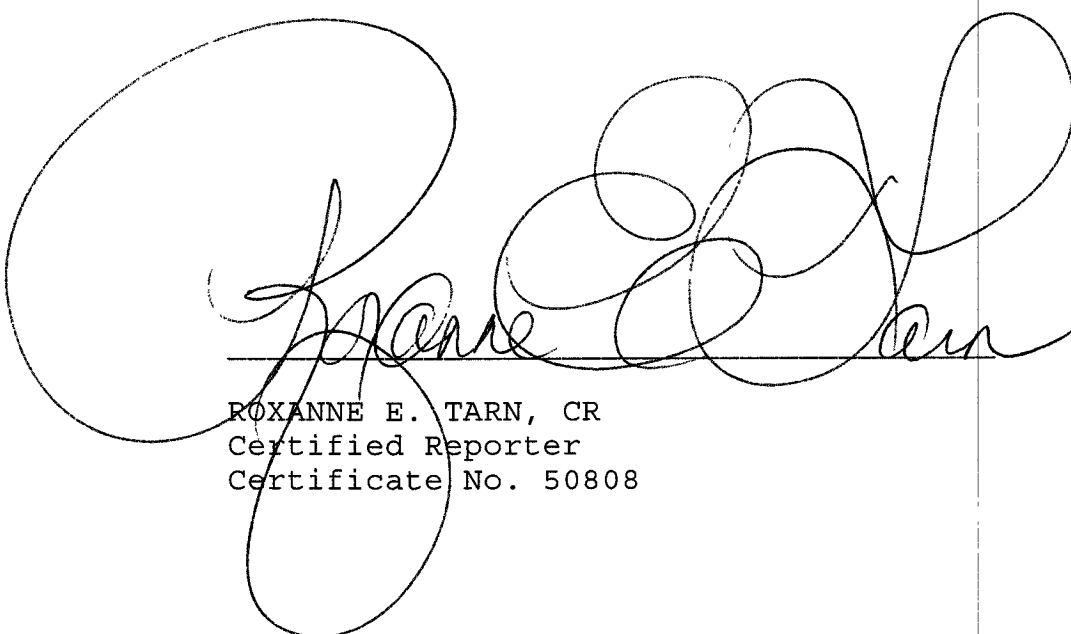
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 142 constitute a full, true, and accurate
transcript of the proceedings had in the foregoing matter,
all done to the best of my skill and ability.

SIGNED and dated this 26th day of February,
2010.

A large, stylized handwritten signature in black ink, appearing to read 'Roxanne E. Tarn', is written over a horizontal line. The signature is highly cursive and loops around itself.

ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808